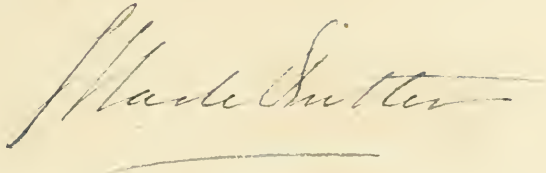

A

PRACTICAL TREATISE

OF

THE LAW

OF

VENDORS AND PURCHASERS

OF

ESTATES.

By SIR EDWARD SUGDEN.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, l. vii. c. 11.

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THE LAW

OF

VENDORS AND PURCHASERS

OF

ESTATES.

CHAPTER X.

OF INTEREST AND COSTS.

SECTION I.

Of Interest.

I. EQUITY considers that which is agreed to be done, as actually performed; and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate (*a*): and as, from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day (*b*).

The same rule applies to a sale of a reversion—interest must be paid from the time fixed upon for payment of the

(*a*) See 6 Ves. jun, 143, 352.

(*b*) See Sir James Lowther *v.* the Countess Dowager of Andover, 1 Bro. C. C. 396, and see 6 Ves. jun. 352.

purchase-money, because the wearing of the lives is equivalent to taking the profits (*c*).

This is so plain a rule, that no disputes could ever arise on it, if the purchase-money were not frequently lying dead; in which case it becomes a question, whether the loss of interest shall fall on the vendor or purchaser.

If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on the purchase-money from the time the contract ought to have been carried into effect, although the purchase-money has been lying ready, and without interest being made of it (*d*).

But if the delay be occasioned by the default of the vendor, and the purchase-money has lain dead, the purchaser will not be obliged to pay interest (*e*). The purchaser must, however, in general, give notice to the vendor that the money is lying dead (*f*); for otherwise there is no equality: the one knows the estate is producing interest, the other does not know that the money does not produce interest (*g*). Wherever, therefore, a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he is making no interest. But even if a purchaser gave such notice, yet if it appears that the money was not actually and *bonâ fide* appropriated for the purchase, or that the purchaser derived the least advantage from it, or in any manner made use of it, the Court would compel him to pay interest.

In Winter *v.* Blades (*h*), the terms of the contract are

(*c*) Davy *v.* Barber, 2 Atk. 490; and see Owen *v.* Davis, 1 Ves. 82; 3 Atk. 637; *vide post* as to the sale of a reversion before a Master.

(*d*) Calcraft *v.* Roebuck, 1 Ves. jun. 221.

(*e*) Howland *v.* Morris, 1 Cox, 59.

(*f*) Calcraft *v.* Roebuck, *ubi sup.*; and see Roberts *v.* Massey, 13 Ves. jun. 561.

(*g*) Powell *v.* Martyr, 8 Ves. jun. 146. See Comer *v.* Walkley, *post.*

(*h*) 2 Sim & Stu. 393.

not mentioned, but the other facts are thus stated: The bill in this cause was filed by the vendor of an estate, merely for the purpose of claiming interest on the purchase-money from the time the defendant, the purchaser, was let into possession. The purchase-money was 14,000 *l.*, and immediately upon entering into the contract, the purchaser called in a sum of money, secured by a mortgage, amounting to 12,400 *l.*, and upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months. The banker of the defendant proved that during the nine months the balance of the defendant in his hands was never less than 14,000 *l.*, except during three successive days, when it was 13,876 *l.*; and one other day, when it was 13,796 *l.*

The Vice-Chancellor said, if after notice given by the defendant, he had made no profit of the purchase-money, then it would not be reasonable that he should be charged with interest. But that he has made some profit of the money, appears upon the defendant's own evidence; first, because his balance at his banker's was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase money supplied the place of that balance, which he must otherwise have maintained at his banker's. It was decreed that the Master should inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month; and the Master was also to inquire what was the average balance which during the time in question the defendant

maintained at his banker's, computing such balance monthly; and the Master was to deduct what he should find to have been the defendant's average balance for the three years, from what he should find to have been the defendant's average balance during the time in question, and it was declared that to the amount of that difference the defendant was not chargeable with interest on his purchase-money.

If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase-money from that time (*i*).

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall, from the time of taking possession, pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor (*k*). But it must be a strong case, and clearly made out, in which he shall not pay interest where he has received the rents and profits (*l*).

Thus, in Comer *v.* Walkley (*m*), the purchaser had been in possession of the estate about twenty-two years, without any conveyance having been executed; and he had not paid the purchase-money. The delay was not attributable to him, and he stated that his money had been lying ready from the time of the contract, without interest being made by it, as he was in daily expectation of being called upon for payment of it; and therefore he insisted that he ought not to be compelled to pay interest. Lord Thurlow, however, decreed, that he should pay interest at four per cent. from the time he entered into possession

(*i*) See *ex parte* Manning, 2 P. Wms. 410.

(*k*) *Per* Lord Hardwicke, in Blount *v.* Blount, 3 Atk. 636.

(*l*) See 8 Ves. jun. 148, 149.

(*m*) Reg. Lib. A. 1784, fo. 625; Smith *v.* Skelton, Reg. Lib. B. 1799, fol. 807.

to the time he paid the purchase-money into the Bank by the order of the Court.

And in a late case, where a particular day was appointed by the agreement for payment of the money, and the purchaser was to have a conveyance on payment of it, the purchaser entered before the conveyance was executed, and, after a delay of several years, during which he had received the rents, being called upon to pay the purchase-money, *with interest*, he resisted the demand of interest; and in answer to a bill filed against him, it was insisted that interest was not payable, as the money was to be paid on an event depending upon an act to be done by the vendor (namely, the execution of the conveyance) forming a condition precedent to the payment of the purchase-money. But Sir Wm. Grant, Master of the Rolls, after observing that the purchaser did not allege that any circumstances had occurred entitling him to relinquish the contract, said, that the act of taking possession was an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied (*n*).

If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase-money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement.

But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase-money, and, by giving notice of that circumstance to the vendor, discharge himself from the payment of interest.

(*n*) Fludyer v. Cocker, 12 Ves. jun. 25.

Thus, in Dickenson *v.* Heron (*o*), after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title could be made; and it was therefore agreed that the purchaser should take possession of the estate, and pay interest on the purchase-money. Great delays having arisen, and the purchaser thinking exchequer bills, in which the purchase-money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance.

The cause was heard before Sir Wm. Grant, Master of the Rolls, who pronounced the following judgment:— "An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase-money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept for ever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waved this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he

(*o*) Rolls, 16th March 1804, MS. See Fludyer *v.* Cocker, *supra*.

might have waved the agreement. Afterwards he thinks he is entitled to say that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out, and to have given the vendor his option, whether he would choose them to remain at his risk, or would wave his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waved the agreement, was the delay in the first instance. The defendant mistook his case; he might have come at an earlier period, and insisted not to pay interest; for a Court would not have held him to an indefinite period. Besides, the notice was not given until a long delay could not take place." And the Master of the Rolls for these reasons decreed the purchaser to pay interest; but, as he bound himself by his long acquiescence, his Honor would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards.

Where it was stipulated that the purchaser was to pay a deposit of twenty-five per cent., and in case of delay five per cent. interest on the purchase-money unpaid, and that the auction-duty was to be borne equally by the vendor and purchaser, the deposit was paid by the purchaser, but he did not pay any part of the auction-duty, and the Court compelled him to pay interest on half of the amount of the auction-duty at five per cent., on the ground that the sum paid into the hands of the auctioneer by the purchaser had been less by the moiety of the auction-duty than it ought to have been; and the circumstance that

the auctioneer had applied the deposit in payment of the auction-duty was considered as of no weight (*p*).

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase-money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state; and the augmented value of the timber by growth, is an equivalent for the interest from the time of the contract to the making of the valuation (*q*). But this, which was a good reason during the war, will not in all times justify the withholding of interest. Many cases have occurred in which the augmented value by growth between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period.

Upon the sale of an estate in possession, under the order of a court of equity, the rule is, that the purchaser is entitled to the possession or rents from the quarter-day preceding his purchase, paying his money before the following one (*r*).

Where a reversion is sold under the order of a court of equity, interest must be paid from the time of his purchase (*s*). And the same rule applies to an annuity, from which time only the purchaser is entitled to receive the annuity (*t*).

(*p*) Townshend *v.* Townshend, 2 Russ. 303.

(*q*) Waldron *v.* Forester, Exchcq. June 30, 1807, MS. *Vide infra.*

(*r*) *Supra*, p. 61. See Mackzell *v.* Hunt, 2 Mad. 34, n.

(*s*) *Ex parte* Manning, 2 P. Wms. 412; Child *v.* Lord Abingdon, 1 Ves. jun. 94; Twigg *v.* Fifield, 13 Ves. jun. 517; but see Davy *v.* Barber, 2 Atk. 489; Blount *v.* Blount, 3 Atk. 636; Growsock *v.* Smith, 3 Anstr. 877; Trefusis *v.* Lord Clinton, 2 Sim. 359.

(*t*) Twig *v.* Fifield, 13 Ves. jun. 517.

Formerly the practice seems to have been, where estates for life dropped in between a person being reported the best purchaser, before a Master, and his taking possession, to direct the purchaser to make some compensation in consideration of the estate being bettered, or otherwise to go before a Master again, and the estate to be put up for a new bidding (*u*), but the rule is now settled as above stated, and the purchaser, from the time the report is or might be confirmed, is entitled to any benefit by the dropping of lives, or the like.

In Kenny *v.* Wrenham, a life-annuity was sold on the 18th of April 1818, for 280 *l.* to be paid by instalments: 200 *l.* in October 1818, and the residue on or before 1st January 1819. It was held that the purchaser was entitled to the annuity from the time of payment of the last, and not from that of the first instalment of the price (*x*).

If, subsequently to a written contract, an agreement be made, that the purchaser shall pay interest on the purchase-money from a particular time, and the agreement is reduced into writing, but signed by the vendor only; yet, if the contract has been in part performed, the purchaser will be bound by the subsequent agreement (*y*).

If a purchaser make payments to a seller exceeding the interest due on the purchase-money, of course rests must be made, and the balance only will carry interest (*z*).

Where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase-money, after part of the term is elapsed, without his having derived any benefit from the estate, the Court will compel the vendor to pay a rent in respect of his

(*u*) Blount *v.* Blount, 3 Atk. 636. See Davy *v.* Barber, 2 Atk. 489.

(*x*) 6 Madd. 355.

(*y*) Owen *v.* Davies, 1 Ves. 82.

(*z*) Griffith *v.* Heaton, 1 Sim. & Stu. 271.

occupation of the estate: and the purchaser to pay interest on the purchase-money during the delay (*a*).

If a tenant for years, at a rent, with an option to purchase the fee, declare his option, he is entitled to retain the rent from that time, and in lieu of it must be charged with interest upon his purchase-money (*b*).

And where a purchaser has not been in possession of the estate, and the seller receives interest, he will be compelled to pay not only the rent which he has received, but that which without his wilful default he might have received (*c*).

In a late case, where the contract had been delayed upwards of fifteen years, by the default of the seller, who had received one third of the purchase-money, and also all the rents of the estate, Sir Thomas Plumer, Master of the Rolls, compelled the seller to account not only for the rents, but for interest at four per cent. upon one third of them (*d*).

Where, however, interest is more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents and profits (*e*); and therefore where a good title is not shown until a given period, the purchaser will pay interest only from that period, and he will of course take the rents from the same time.

(*a*) Dyer *v.* Hargrave, 10 Ves. jun. 505.

(*b*) Townley *v.* Bedwell, 14 Ves. 591.

(*c*) Acland *v.* Gaisford, 2 Mer. 28; Wilson *v.* Clapham, MS.; 1 Jac. & Walk. 36, S. C.

(*d*) Burton *v.* Todd, Todd *v.* Gee, 31 Mar. 1818, MS. Appendix, No. 21. See Lacon *v.* Mertins, 3 Atk. 1; 12 Ves. jun. 28; Wilde *v.* Fort, 4 Taunt. 334.

(*e*) Esdaile *v.* Stephenson, 1 Sim. & Stu. 122; Paton *v.* Rogers, 6 Madd. 256; Jones *v.* Mudd, 4 Russ. 118.

But where there is an express stipulation, that if the conveyance is not executed, and the purchase-money paid by the day named, interest shall be paid until the purchase is completed, it has been held that the terms of that stipulation apply to every delay (*f*).

In the case of Monk *v.* Huskisson (*g*), however, the contract fixed a day for the conveyance to be executed, and provided that the Crown, on payment of the purchase-money, should be entitled to the rents from that day. The contract then provided, "that if, by reason of any unforeseen or unavoidable obstacles, the conveyance cannot be prepared or perfected for execution on the day named, the Crown should pay interest for the purchase-money from that day (from which time His Majesty is to be entitled to the rents and profits), after the rate of five per cent. per annum, until the completion of the assurances." The title was not made out until a much later period than the day named, and Sir John Leach, Master of the Rolls, gave the sellers interest only from the time when a good title was shown. Upon a re-argument, it was submitted that the express stipulation governed the case; but the Master of the Rolls held that the effect of the stipulation was not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest to which the vendors might be entitled, at five per cent instead of four per cent. But in Oxenden *v.* Lord Exmouth (*h*), the condition was, that if from any cause whatever (except the wilful default of the vendor), the completion of the purchase made by any purchaser should be delayed beyond the 26th of December, the purchasers respectively so making delay should pay interest to the vendor, after the rate of five per cent., per annum from that time till the

(*f*) S. C.
(*g*) 4 Russ. 121 n.
(*h*) V. C. 13 Nov. 1833. MS.

completion of the purchase, on the residue then unpaid of the purchase-money. The whole estate was sold by private contract. The purchaser, when the time appointed for completing the contract arrived, insisted that the contract was no longer binding, and took, besides, several objections. Thereupon the vendor filed a bill for a specific performance, and after a severe contest, in the Master's office, the Master reported in favour of the title, and that a good title was shown before the filing of the bill. Exceptions were taken both as to the title and the time of showing it. The former was over-ruled, but the latter allowed. But as the Vice-Chancellor considered that the suit was rendered necessary by the conduct of the purchaser, independently of title, he held that there was no *wilful default* within the meaning of the condition, and therefore that interest at five per cent. was payable from the day named.

In a case where a public-house was sold, with the goodwill and the licences, and the furniture, stock, &c. were to be taken at a valuation, and the purchase to be completed at a day named, but the seller continued to carry on the trade beyond that day, although the valuations were made, the purchaser objecting to the title: The purchaser was held bound to perform the contract; and the principle was followed up by charging the purchaser with interest on the purchase-money and valuation, and with the money expended in the business, and giving him the produce of the business, and the purchaser was to have the present stock in trade. But upon appeal, it was decided that the purchaser was not liable for the transactions of the trade, and was only to pay for so much of the original stock in trade as could be delivered to him, and was not bound to take the new stock; but the purchaser was charged with the rent, taxes, and other necessary outgoings of the premises since the time ap-

pointed for performance of the contract, with interest thereon, and he was refused an occupation-rent which he claimed from the seller (*i*).

The purchaser never pays interest on the deposit, although by his default the seller may have been prevented from receiving it from the auctioneer (*k*).

It frequently happens, that part of the purchase-money is left in the hands of the purchaser, for the purpose of paying off incumbrances at some distant period; and, in that case, the purchaser must pay interest for it to the vendor (*l*).

In Comer *v.* Walkley (*m*), it appeared, that a sum was left in the purchaser's hands, at interest, as an indemnity against an incumbrance. The purchaser afterwards paid part of the sum to the vendor; notwithstanding which, the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited; and the mistake being admitted, the Master was directed to take annual rests of the over-payments, and to compute interest thereon at five per cent., and the amount of the over-payment and interest to be deducted from the sum which would be found due from the purchaser.

Where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express agreement.

But where he proceeds against the auctioneer to whom the deposit was paid, he cannot recover interest unless under particular circumstances; *e. g.* where, when the title was made out, if the auctioneer was called upon to

(*i*) Dakin *v.* Cope, 2 Russ. 170.
(*k*) Bridges *v.* Robinson, 3 Mer. 694.
(*l*) Hughes *v.* Kearney, 1 Scho. & Lef. 132.
(*m*) Reg. Lib. A. 1784, fo. 625.

pay it over, and refused, he might be liable from that time, or perhaps it was said, if he actually made interest of the deposit (*n*). An auctioneer ought not to be liable generally to interest: for an auctioneer is bound to keep a deposit till the execution of the contract, as a banker or depositary of it: for which reason it seems doubtful whether, if he actually made interest of it, he ought to be compelled to pay interest (*o*)

The non-liability of the auctioneer was solemnly decided in Harrington *v.* Hoggart (*p*), although the seller, but without the concurrence of the purchaser, gave him notice to invest the deposit. Lord Tenterden, C. J., in delivering judgment, said, "there is an essential distinction between the character of an agent and that of a stakeholder. The case of Rogers *v.* Boehm (*q*) was the case of an agent; and what Lord Kenyon there said, must be understood to apply to a person filling that character. If an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal. If, instead of paying it over to his principal, he thinks fit to retain it, and makes a profit of it, he may, under such circumstances as occurred in that case, be liable to account for the profit. Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party; he receives it for both; and until the event is known, it is his duty to keep it in his own hands. If he thinks fit to employ it, and make interest of it, by laying it out in the funds or other-

(*n*) Farquhar *v.* Farley, 7 Taunt. 592; Lee *v.* Munn, 8 Taunt. 45; 1 Moore, 481; Curling *v.* Shuttleworth, 6 Bing. 121; 3 Moo. & P. 368, S. C.

(*o*) See Lord Salisbury *v.* Wilkenson, 8 Ves. jun. 48; and 3 Bro. C. C. 43; 14 Ves. jun. 509, cited. See also Browne *v.* Southouse, 3 Bro. C. C. 107; *sed vide* Willis *v.* the Commissioners of Appeals in Prize Causes, 5 East, 22. Gaby *v.* Driver, 2 Yo. & Jerv. 549.

(*p*) 1 Barn. & Adolph. 577.

(*q*) 2 Esp. 702.

wise, and any loss accrue, he must be answerable for that loss; and if he is to answer for the loss, it seems to me he has a right to any intermediate advantage which may arise. The defendant here has not laid out or made a profit of the plaintiff's money; for at the time he laid it out it was not the plaintiff's, and it was doubtful whether it would ever become so or not. Then there is in this case the special circumstance of the requisition by Sir John Harrington to the defendant, that he should lay out the money. The answer given to that was, "I will do it if Mr. Secretan, the purchaser, will consent;" which was saying, in effect, though not in words, "I am a stakeholder: I am answerable to Mr. Secretan for the money, or I may be in the result, and I cannot without his consent, therefore, do what you ask." Mr. Secretan's consent was never obtained. As to the offer of an indemnity, it was not insisted upon; and it could not well be insisted that any person is bound to take the indemnity of another. Therefore that special circumstance, in my opinion, does not take the case out of the general rule, or deprive the defendant of the character of a stakeholder, or of the advantages, if there be any, which belong to that character, nor exempt him from the obligations arising from it. As to the cases that have been cited upon this subject, there certainly is none in which interest has been recovered from an auctioneer. The strong inclination of Lord Eldon's opinion was, that it could not be recovered in this particular case, even although it should appear that a profit had been made. By deciding now, that the defendant is not liable, we certainly do not vary from any principle which has been laid down by a Judge in equity, or make the law in this Court different from the rule in equity. I have observed, that there is no case in which interest has been recovered against an auctioneer. There has been, as there may

well be, a recovery of interest by the purchaser against the vendor, where the latter has not been able to complete his contract; but that has been as part of the damage which the purchaser sustained by the non-completion of the contract. Part of that damage is the loss of the use of that money, which in the mean time has been lying idle in the hands of the auctioneer. There may be cases also in which the vendor may have a right of action for damages against a purchaser who has failed to complete his contract. But there was no authority to show that an auctioneer is liable to pay interest on a deposit."

If interest be recovered against an auctioneer, and he himself be not in fault, he may recover it from the vendor (*r*).

And where the statute of limitations has run, and it is pleaded, but the auctioneer pays the deposit into court, he cannot be compelled to pay interest; although, but for the statute, the deposit would have carried interest, as the payment of the principal does not raise any implied promise to pay the interest (*s*).

And where the purchaser recovers the deposit only from the auctioneer, he may, in an action against the seller, recover interest on it, and the expenses of investigating the title, under an averment of special damage (*t*).

If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser (*u*).

(*r*) See Spurrier *v.* Elderton, 5 Esp. Ca. 1. *Qu.* if the case can arise after the decision in Harrington *v.* Hoggart.

(*s*) Collyer *v.* Willock, 4 Bingh. 313; 12 Moo. 557, S.C.

(*t*) Farquhar *v.* Farley, 7 Taunt. 592; 1 Moo. 322.

(*u*) Fleureau *v.* Thornhill, 2 Black. 1078.

Thus the law seemed to stand upon the decided cases, and the practice appeared to be conformable to it. But in consequence of some *general* rules as to interest, which were laid down by Lord Ellenborough in some cases at *nisi prius*, it was thought, by some, that interest could not be recovered in many cases in which it had formerly been obtained (*x*). These rules, however, were not intended to embrace every possible case; for it was not denied that interest may be recovered upon an *implied* contract for payment of it (*y*); and, accordingly, in a case before Lord Ellenborough at *nisi prius*, where the title was bad, and the purchaser, in his action for recovery of the deposit, declared specially, and alleged by way of special damage, that by reason of a good title not being made, he had lost and been deprived of the use of the money which he had deposited, according to the conditions of sale, Lord Ellenborough said, that they had lately held that interest was not recoverable on money lent, without some evidence of a contract for that purpose; but he thought that the plaintiff, in the case before him, ought to be allowed interest, as special damage from the day when the purchase ought to have been completed. He averred in his declaration, that by the defendant's breach of contract he had since lost the use of his money, and he had proved that averment. There seemed to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his deposit, and the purchaser had a verdict accordingly (*z*). This decision agrees with the general practice of the Profession, and has been since followed by the

(*x*) De Havilland *v.* Bowerbank; Crockford *v.* Winter, 1 Camp. Ca. 50, 124; De Bernales *v.* Fuller, 2 Camp. Ca. 426.

(*y*) Calton *v.* Bragg, 15 East, 213.

(*z*) De Bernales *v.* Wood, 3 Camp. Ca. 258.

Court of Common Pleas (*a*); but yet Mansfield, C. J. ruled otherwise at *nisi prius* before the last decision; and in a later case at *nisi prius*, Lord Tenterden said, he did not know of any case of this kind in which interest had been allowed (*b*). The legal right to recover, therefore, is left in great doubt upon the authorities.

By a recent statute (*c*) it is enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debt or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, with a proviso, that interest shall be payable in all cases in which it is now payable by law.

Where the biddings before a Master are opened, the purchaser will be allowed interest at the rate of 4 *per cent. per annum*, on such part of the purchase-monies as the Master shall find to have lain dead (*d*).

Where the purchaser pays into court a sum of money on account, and in part of the purchase-money, which is invested at the request of the vendor (*e*), it is the money of the vendor, who is to take the chance of the rise or fall of the stocks (*f*).

(*a*) Farquhar *v.* Farley, 7 Taunt. 592; 1 Moo. 322.

(*b*) Bradshaw *v.* Bennett, 5 Carr. & Pay. 48.

(*c*) 3 & 4 W. 4, c. 42, s. 28.

(*d*) This was directed on opening the biddings for General Birch's estate, MS.

(*e*) This fact does not appear in the Report. S. C. MS.

(*f*) Gell *v.* Watson, 2 Sim. & Stu. 402.

Where a purchase by a trustee is set aside, and the estate restored to the *cestui que trust*, the purchaser is allowed interest on the money paid by him, and is compelled to pay a rent for the estate during his enjoyment of it (*g*).

But where a sale is annulled on account of notice in the purchaser of a prior claim, and he is decreed to account for the rents, it seems that he shall not be charged with interest on the rents (*h*).

Where a purchase was set aside on the ground of fraud, and the purchaser was decreed to pay an occupation-rent, and to be repaid his purchase-money and interest, annual rests were directed, so that the excess of rent beyond the interest might go in reduction of the capital (*i*).

An agreement, that if the purchase-money be not paid at the time stipulated, the purchaser shall pay a rent for the estate, exceeding the legal interest of the money, is not usurious (*k*).

And an agreement to sell an estate for a principal sum, which, *with interest* added thereto after the rate of 6 *l.* per cent. per annum, for the time the notes had to run, was secured by certain promissory notes according to the contract, was held not to be a usurious contract. The Lord Chief Justice said that the case arose out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price, if paid for at a future day. The only difficulty had been occasioned by calling the difference between these two prices *interest*; but it was their duty to look, not at the form and words, but at the substance of the transaction; and as on the one hand they should not pay attention

(*g*) *Infra*, ch. 14.
(*h*) Macartney *v.* Blackwood, Irish Term Rep. 602.
(*i*) Donovan *v.* Fricker, 1 Jac. 165.
(*k*) Spurrier *v.* Mayoss, 1 Ves. jun. 527; 4 Bro. C. C. 28.

to the words of the contract if the substance of it went to defeat the provisions of the statute of the 12 Anne, c. 16, so on the other hand they ought not to rely upon the words so as to defeat the contract, if in substance the transaction was legal. It appeared to him, that in substance this was a contract for sale of the estate at the price of 20,800 *l.* to be paid by instalments; in that there was no illegality; the defence set up therefore failed (*l*).

II. Where interest is recovered at law, it is always at the rate of 5 *per cent.* (*m*), but in equity the rate of interest allowed is 4 *per cent.* (*n*).

In Blount *v.* Blount (*o*), Lord Hardwicke said, the Court would give such interest as was agreeable to the nature of the land purchased; but this seems never to be taken into consideration, nor indeed ought it to be; interest being given not so much on account of the profits of the estate, as the unjust detention of the purchase-money.

In Dickenson *v.* Heron (*p*), at the time the purchaser took possession of the estate, it was agreed he should pay interest on the purchase-money, but no rate was fixed. The purchase-money, however, then produced 5 *per cent.*, and it was understood between the parties that interest was to be paid at that rate; and although this under-

(*l*) Beete *v.* Bigwood, 7 Barn. & Cress. 453; 1 Mann. & Ryl. 143, S. C.

(*m*) See now 3 & 4 W. 4, c. 42, s. 28, *supra*.

(*n*) Calcraft *v.* Roebuck, 1 Ves. jun. 221; Child *v.* Lord Abingdon, 1 Ves. jun. 94; Comer *v.* Walkley, Reg. Lib. A. 1784, fo. 625; Pollexfen *v.* Moore, Reg. Lib. B. 1745, fo. 283, at the bottom; Smith *v.* Hibbard, Chanc. 11 July 1789; M'Queen *v.* Farquhar, Lib. Reg. B. 1804, fol. 1095; Browne *v.* Fenton, Rolls, June 23, 1807, MS., and see Lord Rosslyn's judgment in Lloyd *v.* Collet, 4 Ves. jun. 609, n; Acland *v.* Gaisford, 2 Mad. 28; Bradshaw *v.* Midgeley, V.C. 13 Nov. 1817, MS.

(*o*) 3 Atk. 636.

(*p*) *Supra*, vol. 2. p. 6.

standing did not appear by any note or writing, the purchaser was decreed to pay interest at 5 *per cent.*

And in a case in the Court of Exchequer, it appeared that one tenant in common had sold his share of the estate, and of the timber, to the other, who was let into possession, but no stipulation was made as to interest. The purchase-money was not paid. A bill was filed by the vendor for a specific performance, and a motion was made that the purchase-money might be paid into Court, or a receiver appointed of the estate sold. And it was accordingly referred to the Master to appoint a receiver, who was directed to pay to the vendor, out of the rents, "interest after the rate of 5 *per centum per annum*, upon the amount of the purchase-money, and the value of the timber on the estate (*i*)." This cause afterwards came to a hearing, when a specific performance was decreed, and the purchaser was decreed to pay interest. A question then arose as to the quantum, and it was decreed, that the purchaser should pay 5 *per cent.*, although it was insisted that 5 *per cent.* was never given, particularly when not prayed by the bill. Lord C. B. Macdonald said, that as to the quantum, he conceived that nothing less than 5 *per cent.* would be a compensation to the vendor, and that, indeed, they had in many cases lately given 5 *per cent.* interest, and the reason of it was too well founded to need any discussion: a person would always find it to be his interest to delay the completion of his purchase, when he knows that he is only to pay 4 *per cent.*, and can make five or six of his money. Mr. Baron Thompson concurred. Mr. Baron Graham wished there had been a general rule, but the Courts had been in the habit of giving 5 *per cent.* where there was delay. The reasons

(*i*) Waldron *v.* Forester, Exch. 4th May 1804, MS.; Gaskarth *v.* Lord Lowther, 12 Ves. jun. 107; and see *ib.* 503.

formerly given had now no ground. The 4 *per cent.* when established, was the current interest, but now, it was holding out an inducement to persons to delay the completion of contracts, as it was notorious that money could not be obtained for even five. Besides, here the Court had forejudged the question in making the former order, although that was without prejudice. Mr. Baron Wood concurred, and the Court carried back the interest to Lady-day 1802, when it seems they thought, upon the construction of the several agreements and letters which had passed, that the contract ought to have been completed (*k*).

In a very recent case 5 *per cent.* was decreed to be paid, although the conditions of sale were silent as to interest. The purchaser was held to have accepted the title by taking possession; and the Court said, that they thought where a purchaser withheld the money from the seller, he ought to pay such interest as the seller might have made of the money had it been paid to him, and that this had frequently been done by Lord Alvanley (*l*).

However, this is not the rule of the Court of Chancery, nor does the reasoning apply to times when the market rate of interest is below 5 *per cent.* And accordingly, in a case where the conditions of sale stipulated that the purchaser should be allowed 5 *per cent.* on the deposit if a title could not be made, but did not contain any other stipulation as to interest; after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase-money 5 *per cent.*, the Vice-Chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest

(*k*) Exchcq. 30th June 1807, MS.

(*l*) Burnell *v.* Brown, Lord C. Baron sitting for the Master of the Rolls, 7 Feb. 1820, MS.; 1 Jac. and Walk. 168.

to 4 *per cent.*, and gave the purchaser his costs of opposing the motion (*m*).

The same rate of interest seems payable, whether the estate be sold by private agreement, or by a Master under a decree of a court of equity.

As connected with interest, we may here observe, that if the completion of a purchase has been delayed by the state of the title, the Court will compel the seller to make an allowance for any deterioration which the lands, hedges and fences have suffered by unhusbandman-like conduct and mismanagement since the date of the contract (*n*).

But a purchaser is not entitled to any allowance for deterioration after he took possession, or after there was a title under which he might have taken possession (*o*).

Where in a specific-performance suit, the purchaser, who claimed an allowance for deterioration, paid his purchase-money into Court under an order, and the amount to be allowed for deterioration was afterwards fixed, he was held entitled to the amount, with interest from the time when he paid his money into court (*p*).

SECTION II.

Of Costs.

At law, the costs abide the event of the action by the vendor or purchaser. In equity, also, the person who fails in the suit must *primâ facie* be deemed liable to the

(*m*) Thorp *v.* Freer, H.T. 1820, MS.

(*n*) Foster *v.* Deacon, 3 Madd. 394, and several cases not reported.

(*o*) Binks *v.* Lord Rokeby, 2 Swanst. 226.

(*p*) Ferguson *v.* Tadman, 1 Sim. 530.

costs. But still, although this is the general rule, yet costs in equity rest entirely in the breast of the Court, for the *primâ facie* claim to costs may be rebutted by the particular circumstances of the case; and it is for the Court to decide whether those circumstances are, or are not, sufficient to rebut the claim (*q*).

If a purchaser file a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title; yet the bill may be dismissed with costs against the defendant (*r*).

If the vendor file a bill for a specific performance, which is dismissed because he cannot make a title, and the estate was misrepresented in the particulars, although without fraud, he must pay the costs (*s*). If the estate was misrepresented, and the auctioneer verbally agreed to allow a deduction if any misrepresentation should appear, the seller's bill would be dismissed, with costs, if he sought to compel the purchaser to take the estate without any allowance, because that would be a fraud. But if the purchaser do not resort to the defence set up by his answer, until after the institution of the suit, that is a ground not to give costs (*t*).

Where there is no misrepresentation, and the question turns upon a point of law, upon which the opinion of the Court might fairly be taken, although the bill be dismissed against the vendor, yet it will be without costs (*u*). If a purchaser is entitled to costs, it is immaterial that the seller was only a trustee for sale (*x*).

But where the bill is dismissed against the purchaser

(*q*) Vancouver *v.* Bliss, 11 Ves. jun. 458. See Scorbrough *v.* Burton, Barnard. Cha. Ca. 255.

(*r*) See and consider Benet College *v.* Carey, 3 Bro. C. C. 390; Lewis *v.* Loxham, 3 Mer. 429.

(*s*) Vancouver *v.* Bliss, *ubi sup.*

(*t*) Winch *v.* Winchester, 1 Ves. & Beam. 375.

(*u*) White *v.* Foljambe, 11 Ves. jun. 337. See *ibid.* 463.

(*x*) Edwards *v.* Harvey, Coop. 40.

with costs, yet he will not be allowed costs of objections argued before the Master, but abandoned at the hearing (*y*).

So a purchaser is considered as entitled to take a fair objection, and although it be over-ruled, yet the Court will not on that ground give costs (*z*); but this, of course, must always depend upon the weight which the Judge may think due to the objection (*a*). In one case, indeed, Lord Eldon thought that as the title was forced upon the purchaser, he should act hardly by him, by not giving the title the credit of making him pay the costs, for it would, he said, help the title. As, however, the vendor had contended, but unsuccessfully, that the purchaser had done acts amounting to an acceptance of the title, costs were refused (*b*).

Where the objection to the title has already been decided in a former cause, of which the purchaser had notice, the purchaser will be decreed to pay the costs of the suit (*c*).

And although a purchaser may fairly object to a title on the ground of a doubtful fact; yet if the fact is found against him, he cannot claim costs, although he will not be compelled to pay them. This was decided in Thorpe *v.* Freer (*d*), where the bankrupt was made a party to the suit, to establish the fact that he had not executed the power before his bankruptcy. He demurred to the bill, as he

(*y*) Hayes *v.* Bailey, L.C. M.T. 1821, MS.

(*z*) Cox *v.* Chamberlain, 4 Ves. jun. 631; Stains *v.* Morris, 1 Ves. & Beam. 8; Sharpe *v.* Roahde, 2 Rose, 192.

(*a*) Burnaby *v.* Griffin, 3 Ves. jun. 266; Bishop of Winchester *v.* Paine, 11 Ves. jun. 195. See Powell *v.* Martyr, 8 Ves. jun. 146; Fludyer *v.* Cocker, 12 Ves. jun. 25; Calverley *v.* Williams, 1 Ves. jun. 210.

(*b*) M'Queen *v.* Farquhar, 11 Ves. jun. 467.

(*c*) Biscoe *v.* Wilks, 3 Mer. 456.

(*d*) MS. See 4 Madd. 466.

might be examined in the bankruptcy, and Sir John Leach, Vice-Chancellor, allowed the demurrer. He was then examined before the commissioners, and upon the examination it was held that the power remained unexecuted. Upon these grounds, it was contended on behalf of the purchaser that he was entitled to his costs, as it was necessary to establish the fact, but they were refused to him on the ground above stated.

In a case where the Master reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not furnished, and some not necessary, the Lord Chancellor held that both of the parties were in the wrong; and, upon the vendor's bill, his Lordship held that no costs ought to be given on either side (*e*).

Where a seller does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time that he showed a good title (*f*). But the Court will not let this rule operate as a trap for the seller; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So as to evidence. But, as to evidence, much depends upon the fact whether further evidence was required by the purchaser. In one case an act of parliament, for releasing the estate from certain portions, was obtained after the filing of the bill. The Master found that a good title was shown when the act was delivered to the purchaser. The purchaser claimed the costs to a later day, on the ground that the act recited a release by deed of other portions, an

(*e*) Newall *v.* Smith, 1 Jac. & Walk. 263.

(*f*) Wilson *v.* Allen, 1 Jac. & Walk. 623, and many MS. cases. See Wynn *v.* Morgan, 7 Ves. jun. 202; Collinge's case, 3 Ves. & Bea. 143, n. (*a*); Lewin *v.* Guest, 3 Russ. 325.

abstract of which had not been furnished. The Vice-Chancellor held that the act was tantamount to an abstract, and that the purchaser should have called for an abstract for the deed, if he had intended to insist upon the want of it, as an objection (*g*).

Where the purchaser might, if he pleased, have had the evidence furnished to him before the bill is filed, although the Master reports that the title was not made out until the evidence was produced, the purchaser will have to pay the costs (*h*). And in Oxenden *v.* Lord Exmouth (*i*), the Court held that the suit became necessary by the improper conduct of the purchaser; and therefore the Vice-Chancellor, although he had allowed as a fact that the title to a part of the estate was not shown until after the filing of the bill, yet held that as the purchaser's misconduct rendered the suit necessary, he must pay all the costs

In the case of Smith *v.* Leigh (*k*), the Master found that the seller could make a title in February 1820, which was subsequently to filing the bill. To the Master's report the purchaser took an exception, and elected to have a case sent to law, which the Vice-Chancellor granted as a matter of course. The point was decided against him; and, upon the cause coming on for further directions, the exception was over-ruled, and a specific performance decreed, and the purchaser was to be paid the costs up to February 1820, other than the costs of his insisting, by his answer, on the illegality or abandonment of the agreement, and the purchaser was to pay the costs of the subsequent proceedings before the Master, and the costs of

(*g*) Emery *v.* Growcock, 1821, MS.

(*h*) Long *v.* Collier, 4 Russ. 269; Holwood *v.* Bailey, 271.

(*i*) 13 Nov. 1833. MS. *supra*, p. 11.

(*k*) V. C. 10 Aug. 1821, MS.; and see Lill *v.* Robinson, 1 Beatty, 85.

the case to the Common Pleas, and the plaintiff was to pay the costs of the hearing.

In the case of Bruce *v.* Bainbridge (*l*), where the bill was filed by the seller, the Master's report was in favour of the title, a case was sent to the C. P., and the certificate was against the title. The bill was dismissed with costs, from the date of the Master's report.

But if a good title is not shown until *after* the bill is filed, and the purchaser take no step inconsistent with the finding of the Master, the seller must pay the costs of the whole suit (*m*).

If a seller, upon a reference to the Master, establish his title upon a different ground from what appeared in the abstract, the purchaser will be allowed the costs of the reference and the applications to the Court (*n*). So, where a purchaser might in the first instance have rescinded the contract, but binds himself by long acquiescence, the vendor will not be entitled to costs (*o*).

Lord Thurlow has said, that if a purchaser will not wait until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it, that weighs much as to costs (*p*). But the circumstance of taking possession is not important, where, by the terms of the contract, the title is to be made good at a subsequent period, much less is it material where the purchaser is induced to take possession at the instance of the vendor himself (*q*).

(*l*) Same day, MS.

(*m*) Annesley *v.* Muggeridge, V.C. 12 Mar. 1825, MS.; and Osbaldeston *v.* Askew, V.C. 11 Mar. 1829, MS.

(*n*) Fielder *v.* Higginson, 3 Ves. & Bea. 142.

(*o*) Dickenson *v.* Heron, *sup.* vol. 2. p. 6.

(*p*) 11 Ves. jun. 464. See Calcraft *v.* Roebuck, 1 Ves. jun. 222.

(*q*) 11 Ves. jun. 464. *Vide sup.* vol. 1. p. 10.

It is, however, to be repeated, that every case must stand on its own grounds, although, from these few instances, some notion may perhaps be formed of what the Court is likely to do in other cases. To multiply the instances in which costs in equity have been given or refused would be as useless as it would be tedious.

CHAPTER XI.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

WHERE a trust is raised by deed or will for sale of an estate, a clause, that the receipts of the trustees shall be sufficient discharges for the purchase-money, is mostly inserted, and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although they were trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract.

The rules on this subject,—principally with a view to testamentary dispositions,—may be considered under two heads: First, with respect to real estate. Secondly, with respect to leaseholds, or chattels real. For the rules applicable to the different species of estates are, as regards testamentary gifts, dissimilar; owing to the much greater power which a testator has over his real, than over his personal estate.

Previously to the statute of fraudulent devises (*a*), freehold lands were not bound by even specialty debts in the hands of an *hæres factum*; although an *hæres natus* was

(*a*) 3 W. & M. c. 14.

liable to specialty debts in respect of land descended (I); but personal property, which was formerly of very trifling value, was always holden to be subject to the *payment of debts generally*, however the same might be bequeathed. And by the statute of Westminster 2, (*b*), it was enacted, that even the ordinary should be bound to pay the debts of the intestate, so far as his goods would extend, in the same manner as executors were bound in case the deceased had left a will. In fact, no man can exempt his personalty from the payment of his debts; but it must go to his executors as assets for his creditors, and be applied in a due course of administration; that is, *however it may be bequeathed*, it must go to the executors, upon trust, in the first place, for payment of debts generally. Now, although the author of the trust may have neglected to free the purchasers of his property from the obligation of seeing that the money is duly applied, yet equity hath thought it reasonable that a purchaser should see to the application of the purchase-money where the trust is of a defined and limited nature only; and not where the trust is general and unlimited, as a trust for payment of debts generally.

(*b*) 13 Ed. I. c. 19.

(I) Although an heir at law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the same footing as an heir at law; but it was lately contended (see Matthews *v.* Jones, 2 Anst. 506,) that the debts of the testator would bind a purchaser from the devisee, although he bought *bonâ fide* and without notice. But this was over-ruled. Equity will, however, in behalf of creditors, grant an injunction against a purchaser to restrain payment to the heir. Green *v.* Lowes, 3 Bro. C. C. 217. In Woodgate *v.* Woodgate, MS. Lord Elden was of opinion, that simple contract creditors, under 47 Geo. III. stand in the above respect in the same situation as specialty creditors under the statute of fraudulent devises.

From these rules it necessarily follows, that a *bonâ fide* purchaser of a leasehold estate from an executor ought not to be bound to see to the application of the purchase-money, although defined and limited trusts be declared of the purchase-money. But, as a testator can declare an *original* limited trust of his real estate, wherever such a trust is created, the purchaser is bound to see the money duly applied.

SECTION I.

Of this Liability, with reference to Real Estate.

And first, with respect to real estate.

1. If the trust be of such a nature, that the purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly (*c*); and that although the estate be sold under a decree of a court of equity (*d*), or by virtue of an act of parliament (*e*).

And the 47 Geo. 3, c. 74 (*f*), which makes the real

(*c*) Culpepper *v.* Aston, 2 Cha. Ca. 221. See Show. 313; Spalding *v.* Shalmer, 1 Vern. 301; Dunch *v.* Kent, 1 Vern. 260; Anon. Mose. 96; Abbot *v.* Gibbs, 1 Eq. Ca. Abr. 358, pl. 2; Elliott *v.* Merryman, Barnard. Rep. Cha. 81; Smith *v.* Guyon, 1 Bro. C. C. 186, and the cases cited in the note (I); and see 1 Ves. 215.

(*d*) Lloyd *v.* Baldwin, 1 Ves. 173. See Binks *v.* Lord Rokeby, 2 Madd. 227.

(*e*) Cotterell *v.* Hampson, 2 Vern. 5.

(*f*) Repealed and re-enacted by the 1 W. 4, c. 47.

(I) One of these cases, Langley *v.* Lord Oxford, is in Reg. Lib. B. 1747, fol. 300; see *post*, S. C. Ambl. 17. The other cases, Tenant *v.* Jackson, and Cotton *v.* Everall, are in Reg. Lib. 1773, B. fol. 120, 481.

estates of traders liable to simple-contract debts, does not alter the rule; and therefore a purchaser from a devisee of a trader is liable to the application of the purchase-money where legacies only are charged on the estate by the will (*g*); and the same principle will therefore apply to the 3 & 4 Will. 4, c. 104, which makes all real estates of persons who die after the 29th of August 1833, liable to all simple-contract debts.

2. If more of an estate be sold than is sufficient for the purposes of the trust, that will not turn to the prejudice of the purchaser; for the trustees cannot sell just sufficient to pay the debts, &c. Besides, in most cases, money is to be raised to pay the trustees' expenses (*h*).

3. Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts; for a purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined (*i*).

4. Nor is a purchaser bound to see the money applied, where the trust is for payment of debts generally, and also for payment of legacies (I); because, to hold that he is liable to see the legacies paid, would in fact involve

(*g*) Horn *v.* Horn, 2 Sim. & Stu. 448.

(*h*) Spalding *v.* Shalmer, 1 Vern. 301.

(*i*) See the cases cited above, and Humble *v.* Bill, 1 Eq. Ca. Abr. 358, pl. 4; *Ex parte* Turner, 9 Mod. 418; Hardwicke *v.* Mynd, 1 Anstr. 109; and Williamson *v.* Curtis, 3 Bro. C. C. 96; Barker *v.* Duke of Devon, 3 Mer. 310.

(I) The above rule, although so long and clearly settled, appears to have been entirely overlooked in the case of Omerod *v.* Hardman, before the Duchy Court, reported in 5 Ves. jun. 722; but this case can by no means be considered as an authority, and has been expressly denied by Lord Eldon. See 6 Ves. jun. 654, n. *Qu.* however, whether the case of Omerod *v.* Hardman was not thought to be within the principle stated in pl. 13, *post*.

him in the account of the debts, which must be first paid (*j*) (I).

5. And for the same reason the purchaser is, of course, not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

6. But although there be no specification of the debts, yet a purchaser, it is said, must see to the application of the money where there has been a decree; as that reduces it to as much certainty as a schedule of the debts. In such cases, therefore, the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors: otherwise he should apply to the Court, that the money may be placed in the Bank, and not taken out without notice to him; the reason of which is, that it is at his peril (*k*). It is now, however, the prevailing opinion that the purchaser is not, in such a case, bound to see to the application of the money. The Court takes upon itself the application of the money.

7. It is the general opinion of the Profession, that where *the time of sale is arrived*, and the persons entitled to the money are infants or unborn, the purchaser is not bound to see to the application of the money; because he would otherwise be implicated in a trust, which in some cases might be of long duration. This point has lately been so decided (*l*).

(*j*) Jebb *v.* Abbot, and Benyon *v.* Collins, Butler's n. (1) to Co. Litt. 290 b, s. 12; and Rogers *v.* Skillicorne, Ambl. 188.

(*k*) Lloyd *v.* Baldwin, 1 Ves. 173.

(*l*) Sowarsby *v.* Lacy, 4 Madd. 142; Lavender *v.* Stanton, 6 Madd. 46; Breedon *v.* Breedon, 1 Russ. & Myl. 413.

(I) And where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. Anon. in Dom. Proc. 1 Salk. 153.

8. But if an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds as a security for the payment of the legacy to the infant, when he shall become entitled; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he may still have recourse to the estate for the deficiency. And it should seem, that even a court of equity cannot, in a case of this nature, bind the right of an infant (*m*).

9. It appears to be thought by the Profession, that although the trusts are defined, yet that payment to the trustees is sufficient, wherever the money is not merely to be paid over to third persons, but is to be applied upon trusts which require time and discretion, as where the trust is to lay out the money in the purchase of estates.

And it now appears that this point was decided as far back as in 1792 (*n*), where in a settlement of real estates with a power of sale, the trustees were to receive the purchase-money, and to lay it out again in lands to the uses of the settlement, and till that was done to invest it in government funds, &c. It was objected that a good title could not be made, as there was no clause that the trustees' receipts should be good discharges. The Lord Chancellor said: As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or

(*m*) Dickenson *v.* Dickenson, 3 Bro. C. C. 19.

(*n*) Doran *v.* Wiltshire, 3 Swanst. 699.

any reasoning in any case which goes the length of saying that a purchaser is so bound; and therefore he conceived that the receipt of the trustees would be a good discharge in this case.

In a recent case, where the trust was to pay the money amongst creditors, who should come in within eighteen months, the estate was sold after that time had elapsed, and Sir William Grant, Master of the Rolls, held, that the receipt of the trustees was a good discharge (*o*). The deed, he observed, very clearly conferred an immediate power of sale, for a purpose that could not be immediately defined, viz. to pay debts which could not be ascertained until a future and distant period. It was impossible to contend that the trustees might not have sold the whole property at any time they thought fit, after the execution of the deed; and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material that the objects of the trust might have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event. Another ground relied upon in this case, was, that the creditors were parties to the deed, and it was clearly intended that the trustees should receive and apply the money.

(*o*) Balfour *v.* Welland, 16 Ves. jun. 151.

10. So where the trust is to lay out the money in the funds, &c. upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money.

This appears to have been the settled practice in Mr. Booth's time; for in answer to a question how far a purchaser was, in a case of this nature, bound to see to the application of the purchase-money, he said he was of opinion, that all that would be incumbent on the purchaser to see done in the case, would be to see that the trustees did invest the purchase-money in their own names, in some of the public stocks or funds, or on government securities; and in such case the purchaser would not be answerable for any non-application (after such investment of the money) of any monies which might arise by the dividends or interest, or by any disposition of such funds, stocks or securities, it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase-money was carrying on; and therefore the testator must be supposed to place his sole confidence in the trustees; and this, he added, was the settled practice in such cases, and he had often advised so much and no more to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will. And in this opinion Mr. Wilbraham concurred (*p*).

11. The same rules respecting the liability of a purchaser to see to the application of the purchase-money appear to apply, whether the estate be devised or conveyed to trustees to sell for payment of debts, &c. or

(*p*) See 2 vol. Cas. & Opin. 114.

whether it be only *charged* with the debts; although a difference of opinion has prevailed in the Profession on this point.

In a case in Mosely (*q*) it was laid down, that a purchaser should be bound to see to the application of the purchase-money where the debts were only charged on the estate.

But in Elliot *v.* Merryman (*r*), the Master of the Rolls decreed otherwise; because, if the contrary rule were holden, no estate could in such cases be sold, except through the medium of the Court of Chancery, which would be productive of the greatest inconvenience.

Lord Camden (*s*) appears to have been of the same opinion; and in a late case (*t*) Lord Eldon said, that where a man, by a deed or will, *charges* or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money.

This point may be considered as settled upon principle, as well as authority. For although a mere charge is no legal estate, but only that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest that will be sufficient for the debts (*u*); yet it is as much a trust, as a direct conveyance or devise to trustees for the same purpose: the only difference is, that in the case of a charge, the trust arises by the construction of equity; whereas in the case of a conveyance or devise, it is produced by the express declaration of the party; and when the trust is

(*q*) Anon. Mose. 96; and see Newell *v.* Ward, Nels. Cha. Rep. 38.

(*r*) Barnard. Rep. Cha. 78; 2 Atk. 41; Ambl. 189, marg.

(*s*) See Walker *v.* Smalwood, Ambl. 676.

(*t*) See 6 Ves. jun. 654, n.

(*u*) See Bailey *v.* Ekins, 7 Ves. jun. 323.

in esse, it seems wholly immaterial by what means it has arisen.

And where an estate is given to a devisee, he paying the debts, so that the words are sufficient to pass the fee, a purchaser from the devisee cannot be affected by any gift over of the estate, for the devisee has a right to sell to pay the debts, and if the price of the estate is more than will satisfy the debts, the remedy of the devisees over is against the first devisee, and not against the purchaser (*x*).

It seems hardly necessary to remark, that where lands are charged with the payment of annuities, those lands will be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund (*y*).

So where an estate is devised, subject to existing charges, the purchaser must of course see the charges duly paid.

12. But if the sale or mortgage, from the circumstances of the transaction, afford evidence that the money was not to be applied for the debts or legacies, the purchaser or mortgagee will hold liable to the charge (*z*).

13. In Johnson *v.* Kennett (*a*), the estate was devised to the son in fee, subject to the debts, an annuity to the widow and legacies to the daughters. The son also was entitled to the personal estate. Two or three years after the testator's death, the son and his wife levied a fine and conveyed the estate without reference to the debts and legacies to uses to bar dower. The son then sold the estate in lots to several purchasers. The convey-

(*x*) Dolton *v.* Hewen, 6 Madd. 9.

(*y*) Elliot *v.* Merryman, Barnard. Rep. Cha. 82. See Wynn *v.* Williams, 5 Ves. jun. 130.

(*z*) Watkins *v.* Cheek, 2 Sim. & Stu. 199.

(*a*) V. C. 10 Dec. 1833, MS.

ances recited the will, the conveyance and fine, the contract to sell, and an agreement to give to the purchasers a bond of indemnity against the legacies. The deeds did not recite that the debts were paid. In some of the deeds the widow joined and released her annuity *pro tanto.* Each purchaser had a bond of indemnity against the legacies, in which no notice was taken of the debts. The daughters filed a bill against the purchasers and the assignee of the son. The bill stated that the son had paid the debts, and that the legacies were unpaid. The answers did not deny that the debts had been paid, and stated the belief of the purchasers that the legacies were unpaid. It was held that the estates were still charged with the legacies in the hands of the purchasers, for they dealt with the son, not as a trustee for the widow and daughters but as the owner of the estate, and they were aware that the legacies were unpaid, and did not represent that they were told or supposed that the debts were unpaid.

14. These are the distinctions which, according to the books, appear to exist in regard to the liability of a purchaser to see to the application of money arising by sale of estates conveyed or devised to trustees upon trust to sell; but the reader must be apprised, that some gentlemen are of opinion, that a purchaser is *in no case* bound to see to the application of purchase-money, *where there is a hand appointed to receive the money.* And it appears that Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, although he made no decision, that trustees having the power to sell, they must have the power incident to the character, viz. the power to give a discharge (*b*).

And Sir William Grant observed, that he thought the

(*b*) See 4 Ves. jun. 99.

doctrine upon this point had been carried farther than any sound equitable principle would warrant. Where, he added, the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power, that is, to give a valid discharge for the purchase-money. But it was not necessary to determine that in the case before his Honor (*c*).

Of those who hold that a purchaser is only liable to see to the application of the money where there is *not* a hand appointed to receive the money, and the trusts of the money are defined, Mr. Powell is the only one whose reasons are before the Profession (*d*). The whole of Mr. Powell's argument (I) appears to have been suggested to him, and indeed depends on the case of Cuthbert *v.* Baker. For throughout the many cases which have been referred to in this chapter, the decisions have invariably been pronounced on the distinction between a limited and a general trust; and in no case has the appointment of a hand to receive the money been considered as affecting the question, any further than that it at one time seems to have been thought, that in every case of a mere charge, the purchaser was bound to see to the application of the money. That this was always deemed the true distinction, is evinced by manuscript and printed opinions to that effect, of all the most leading characters in the Profession of the last and present century. So Lord

(*c*) See 16 Ves. jun. 156.
(*d*) See 1 Mortg. 312–330, 4th edition.

(I) See the 3d edition of Powell on Mortgages, where the point is not noticed.

Eldon, in condemning the doctrine advanced in Omerod *v.* Hardman (*e*), did not say it was wrong because there was a hand appointed to receive the money (which was the fact), but because the first trust was for payment of debts generally.

Mr. Powell, however, was not singular in his construction of the decree in the case of Cuthbert *v.* Baker. It is well known by the Profession, that Lord Redesdale, who was counsel for Baker, the purchaser, considered the decision in the same light.

The case is thus stated by Mr. Powell:—*A* made his will (*f*), and thereby directed that all his personal estate (except as therein excepted) should be applied, as far as the same would extend, in payment of debts, legacies, and funeral expenses, and of all annuities by him granted; and if such personal estate should not be sufficient for those purposes, then it was his further will and desire, and he did direct, that the deficiency, whatever it might be, should be paid and made good out of his real estate (except a part therein mentioned, which he did not intend to make subject thereto), and which real estates he charged with the payment of such deficiency, to whose hands soever the same came. And so subject and exempt, he gave, devised, &c. all his real and personal estate in the following manner: certain parts of his estate to his wife in fee; and as to the manors, messuages, &c. not given to his wife in fee, he devised them to his wife for life; and, after her decease, he gave the same to trustees, in trust to sell and to divide and to distribute the money which should arise by such sale between and amongst such child or children of *A B*, on the body of his then

(*e*) See 6 Ves. jun. 654, n. *et supra*, n. (I) to s. 4.

(*f*) Mr. P. refers to 4th July 1790, Reg. Lib. 4, 441; the correct reference is Lib. Reg. A. 1790, fo. 442.

wife begotten; and such children of *C D* (I) as should be living when the devise to the trustees should take effect, equally share and share alike, to take *per capita*, and not *per stirpes:* if but one such child, the estate to be transferred to him, and not to be sold. The wife died. One trustee died in her life-time. The surviving trustee sold the estate by auction. The personal estate was sufficient to discharge the debts: the claimants under the devise to children were seven children of *A B*, and six children of *C D* (II), who were entitled to the purchase-money in equal shares. One of the children of *C D* was in the East Indies, and two were infants. The purchaser refused to complete his purchase, objecting thereto on the ground, that there being no proviso in the will to exonerate the purchaser from seeing to the application of the money, the purchaser was bound to know or find out what children of the persons in that behalf named were living at the testator's wife's death; for that such children ought individually to execute the conveyance, and give releases for their respective claims; and that one being in the East Indies, and two being infants, could not join in such conveyance. But the decree was, that the contract should be carried into execution, that the infants' shares of the purchase-money should be paid to the Accountant-general, and that the remainder of the purchase-money should be paid to the trustee. The decree proceeded to direct that all proper parties should join in the proper conveyances.

Mr. Powell observes, that this decision, though not final, as it still left room for an application to the Court to determine who might be proper parties to the con-

(I) This is mistated, for the money was given to such of the children of *three* persons as should be living at the time when the devise to the trustees should take effect.

(II) This is inaccurate. There were seventeen children in all.

veyance, appeared to him to be conclusive on the question, whether the persons beneficially entitled are necessary parties; because there could be no ground to consider those persons as necessary parties, unless it were to discharge the purchaser : but there seemed to him to be no power in the Court to compel a person beneficially interested in money to arise by sale of land, to discharge that land, unless it were upon paying or securing the money to him. But the Court, by directing the payment to the trustee, had done that which rendered a direction to pay to the *cestui que trust* impossible.

It will be seen that Mr. Powell's argument is entirely founded on the order to pay the remainder of the purchase-money to the trustee, and this ground wholly fails him ; *for all the* cestuis que trust *were plaintiffs, and the prayer of the bill was, that the infants' shares might be invested, and that the remainder of the purchase-money might be paid to the trustee.*

It is not noticed in the foregoing statement of the case, that no costs were given; but the fact is, that the purchaser was refused his costs, and that circumstance may perhaps induce a conclusion, that the construction put upon the case by Mr. Powell is correct.

But it is conceived, that there is a ground upon which the decision may be supported without impeaching the settled doctrine on this subject. The trust was for *such* of the children of three persons as should be living when the estate should fall into possession, and it was strongly insisted by the bill, and, it is apprehended, with great reason, that the *cestuis que trust* were in regard to the purchaser undefined ; and he was not bound to ascertain or inquire how many there were, and who they were. The facts of the case were such as to tempt a Judge to put that construction on the trust; there were seventeen children, two of whom were infants, and another was in

the East Indies. It should seem, therefore, that there is a solid principle to which Lord Thurlow's decision can be referred, and, consequently, a purchaser can scarcely be advised to incur the risk of paying money to a trustee, on the authority of this case, in opposition to the former decisions. Perhaps another ground remains upon which the decision might have been made. All the *cestuis que trust* of age, and in the kingdom, offered, previously to the commencement of the suit, to give receipts for their shares: the receipt of the trustee would certainly have been a sufficient discharge for the shares of the infants, and also, as it is conceived, for the share of the *cestui que trust*, who was abroad. And in this view of the case the purchaser was clearly liable to the costs. It were difficult to maintain, that the absence of a *cestui que trust* in a foreign country shall, in a case of this nature, impede the sale of the estate. Lord Thurlow's judgment in this case would be a very desirable present to the Profession. In a case which came before the same Judge a few years before that of Cuthbert *v.* Baker, and which I learn from a gentleman who has seen the papers relating to the estate, is correctly reported, the estate was subjected to the payment of debts generally; and his Lordship said, that the purchaser was a mere stranger, and was not bound to look to the application; *where the estate is to be sold, and a specific sum, as 5 l., to be paid to* A, *the purchaser must see to the application*; but where it is to be sold generally, he is not (*g*).

In the case of Currer *v.* Walkley, reported in Mr. Dickens's second volume (*h*), which was also before Lord Thurlow, it is stated that the testator had devised estates, subject to particular charges: he afterwards entered into a contract for sale of a part of the estate, and the pur-

(*g*) Smith *v.* Guyon, 1783, 1 Bro. C.C. 116. (*h*) 2 Dick. 649.

chaser paid the sum of 600 *l.* as a deposit. The bill was for an account of what was due to the plaintiff in respect of his charge, and that the purchaser might pay out of the remainder of his purchase-money what remained due to the plaintiff. Lord Thurlow is reported to have said, that if an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate, it is enough for the purchaser to pay the purchase-money into the hands of the trustees, to apply it, as it doth not lie with him to see it applied; but if the estate be devised, subject to particular charges, it is incumbent on him to see it applied in payment of those particular charges.

This case seemed to apply to the point under discussion; but no reliance could be placed upon it, as it was to be inferred from the report, that Lord Thurlow held, that a devise of an estate was not revoked in equity by a subsequent contract for sale of it—a doctrine which it was difficult to suppose could have fallen from so great a Judge.

The case is stated in the Registrar's book (*i*), by the name of Comer *v.* Walkley, and Mr. Dickens' report of it is a complete mis-statement. The estate was originally devised to trustees upon trust, to sell and pay debts generally. The estate was subject to an annuity at the death of the testator. The trustee sold a part of the estate for 720 *l.*, 600 *l.* was left in the purchaser's hand as an indemnity against the annuity. The purchaser afterwards paid 250 *l.*, part of the 600 *l.*, to the trustee. By several conveyances, &c. the estate purchased became again vested in trustees upon trust, to sell for payment of debts generally. These trustees sold the estate to Charles Whittard, who objected to complete the contract without the concurrence of the person entitled to the residue, then

(*i*) Reg. Lib. A. 1784, fol. 625.

unpaid, of the 600 *l.* After a great lapse of time the person entitled to the residue of the 600 *l.* filed a bill against Whittard and others for payment of it; and Whittard filed another bill for a specific performance, which was accordingly decreed; and the proper accounts were directed to be taken in the first cause. Whittard's costs in both causes were allowed to him. The decision, therefore, appears to have been, that the 600 *l.* was a lien on the land. The latter part of Lord Thurlow's judgment, reported by Dickens, clearly referred to the annuity, which was a subsisting charge on the estate at the testator's death. And adverting to the circumstances of the case, the first part of the judgment may, perhaps, be read thus: If an estate is devised to trustees to sell, and the *trustees* afterwards contract for the sale of the estate, it is enough for the purchaser to pay the purchase-money into the hands of the trustees to apply it, as it doth not lie with him to see it applied. Now this, as corrected, seems in favour of the opinion, that where a hand is appointed to receive the money, a purchaser is not bound to see to the application of the purchase-money; but it should not be forgotten, that this observation was made in a case where the trust was for payment of debts generally.

15. Where the trust is to raise so much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems formerly to have been doubted whether the purchaser was not bound to ascertain the deficiency. Mr. Fearne thought a purchaser was bound to do so (*k*). But the opinion of the Profession is certainly otherwise (*l*). Indeed, a direction that the personal estate shall be first applied, only expresses the rule of equity, where, as in a case of this nature, no intention appears to exonerate the personalty from the payment of

(*k*) Fearne's Posthuma, p. 121.

(*l*) See the 12th section of Mr. Butler's n. (1) to Co. Litt. 209 b.

the debts; and, therefore, such a direction cannot be deemed material.

16. Where a *mere power* is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems that unless the personal estate be actually deficient, the power does not arise, and consequently cannot be duly executed. This was expressly decided in the case of Dike *v.* Ricks (*m*), where, in a case of this nature, it was determined by Jones, Croke and Barkeley, Justices, unanimously, that the condition was a precedent condition, and that the performance of it ought to be sufficiently averred, otherwise the power would not authorize a sale; and that the amount of the debts, and the value of the personal estate, ought to be shown, so that the Court might judge whether the condition was performed or not; and also that so much only of the estate could be sold as was sufficient for payment of the debts. And the case of Culpepper *v.* Aston (*n*), also appears to be an authority, that in such a case a purchaser is bound to ascertain the deficiency; for in that case the will seems to have given a *mere power* (*o*) to the executors to raise as much money as the personal estate should fall short in paying the debts. The will was revoked *pro tanto* by a subsequent conveyance creating a direct trust to sell and pay debts, under which it seems the purchaser bought; and therefore the point did not call for a decision. But it was resolved, that by the trust (that is, power,) in the will to sell, the purchaser did purchase at his own peril, if the personal estate received were sufficient; but that if the trust were as in the deed, the purchaser was safe.

(*m*) Cro. Car. 335; Wm. Jones, 327; 1 Ro. Abr. 329, pl. 9; 3 Vin. Abr. 419, pl. 9.

(*n*) See 2 Cha. Ca. 221.

(*o*) 2 Cha. Ca. 115.

The reader must be aware, that as the power is not well executed, unless there be a deficiency, a purchaser must, at his peril, ascertain the fact, notwithstanding that the trust be for payment of debts generally; or being for payment of particular debts or legacies, the *common clause*, that the trustees receipts shall be sufficient discharges, be inserted in the instrument creating the trust.

Wherever, therefore, a power of this nature is given, and even where a trust for such purposes is raised, it seems advisable, as Mr. Butler remarks, to extend this clause a degree farther, by expressly discharging the purchaser or mortgagee from the obligation of inquiring, whether the personal estate has been got in and applied; and by expressly authorizing the trustees to raise any money they may think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that the getting in of the personal estate is attended with great delay and difficulty; during which the real estate cannot perhaps be resorted to. This will be obviated effectually by inserting a clause to the above effect. It should, however, be accompanied with a further direction, that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates (*o*).

17. Where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts, or legacies, he must see the money actually paid to the creditors or legatees.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser

(*o*) Butler's n. (1) to Co. Litt. 290 b.

may have one. Or, if the creditors or legatees are but few, they may be made parties to the conveyances.

Another mode by which the purchasers may be secured is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into court; and this is the surest mode, because the money will not be paid out of court without the knowledge of the purchaser.

18. If the names of the trustees be inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase-money, although he may have released the estate to the other trustees (*p*); because, notwithstanding that he release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him; for the rule is, *delegatus non potest delegare*.

To obviate this difficulty, which frequently occurs, it might, perhaps, be advisable (instead of naming the trustees in the clause) to say, that the receipts "of the trustees or trustee, for the time being, acting in the execution of the trusts hereby created," shall be sufficient discharges. This would probably render it unnecessary for a trustee who had released the estate to join in any receipt:—there could not be the slightest ground to contend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust; and therefore the receipt of the trustees acting in the

(*p*) Crewe v. Dicken, 4 Ves. jun. 97. See *post*. Marwood, 9 Barn. & Cress. 307; Small v. 4 Mann. & Ryl. 181.

trusts, for the time being, would satisfy as well the words as the spirit of the clause (*q*).

19. But as one man cannot impose a trust on another against his consent, a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts; in such cases the receipts of the other trustees will be sufficient discharges (*r*). And it seems, that where there is a release instead of a disclaimer, yet if the operation of the act is disclaimer the release must be considered as a disclaimer (*s*). This of course cannot apply to any case where the trustee has acted in execution of the trusts, for the estate is then vested in him, and it is too late to disclaim.

20. Where an estate is devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be discharges, and they convey to a third person, *for the purposes of the trust*, sales made by him are said to be as effectual as sales made by the trustees themselves, and his receipt is equally a discharge to a purchaser (*t*).

21. If an estate is vested in trustees to sell, with power to give receipts, but no power is added to appoint new trustees, and upon a bill filed, the Court appoints new trustees, they can give a valid discharge; for the effect of the conveyance to the new trustees is to bind the legal estate, and the decree of the Court binds the equity; so that the new trustees have the same power to give receipts as the original trustees had (*u*).

(*q*) See Co. Litt. 113 a.

(*r*) See Sir William Smith *v.* Wheeler, 1 Ventr. 128; Hawkins *v.* Kemp, 3 East, 410; Adams *v.* Taunton, 5 Madd. 435.

(*s*) Nicloson *v.* Wordsworth, 2 Swanst. 365.

(*t*) Hardwicke *v.* Mynd, 1 Anstr. 109. See Ld. Braybroke *v.* Inskip, 8 Ves. jun. 417; *sed qu.*

(*u*) Drayson *v.* Pocock, 4 Sim. 283.

SECTION II.

Of this Liability, with reference to Leasehold Estates.

1. We have already seen, that however leasehold estates may be bequeathed, they must go to the executors, to be applied, in the first place, in a due course of administration, which is tantamount to a bequest for payment of debts generally. And, therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the application of the purchase-money where he purchases *bonâ fide*, and without notice that there are no debts (*w*).

This principle was adhered to in the case of Humble *v.* Bill (*x*), before Sir Nathan Wright, where a man bequeathed a specific part of his personalty upon trust to raise a sum of money for his daughter, and the executors mortgaged it, pretending want of assets. The decision was, however, reversed in the House of Lords (*y*); but the reversal is generally supposed to have proceeded from proof of fraud, and has not been attended to in subsequent cases.

Thus, in Ewer *v.* Corbet (*z*), it was expressly holden, that a term being bequeathed to *A*, did not prevent the executors from selling it; and that notice of the devise was nothing, as every person buying of an executor necesarily must have such notice. And the Master of

(*w*) Elliot *v.* Merryman, Barnard. Rep. Cha. 78; 2 Atk. 41. See Watts *v.* Kancy, Toth. 141; S. C. *ibid.* 227, by the name of Mutts *v.* Kancie; and Nurton *v.* Nurton, *ibid.*

(*x*) 2 Vern. 444; 1 Eq. Ca. Abr. 358, pl. 4.

(*y*) See Savage *v.* Humble, 1 Bro. P. C. 71; and see 17 Ves. jun. 160, 161.

(*z*) 2 P. Wms. 148; and see Burting *v.* Stonnard, 2 P. Wms. 150; and Andrew *v.* Wrigley, 4 Bro. C. C. 137; and Dickenson *v.* Lockyer, 4 Ves. jun. 36.

the Rolls said, he remembered it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of Bill *v.* Humble; but since that he took it to have been resolved, and with great reason, that an executor, where there were debts, might sell a term; and the devisee of the term had no other remedy but against the executor to recover the value thereof, if there were sufficient assets for the payment of debts.

2. This doctrine has been carried so far, that a sale in satisfaction of a private debt of the executor has been holden good (*a*).

But in the first authority on this head (*b*), it appears that the testator had been dead two years before the assignment, although that circumstance is not mentioned in the report (*c*); and it might, therefore, be supposed, that the executor might in that case have entitled himself to the term, on account of advances made by him in his trust (*d*); and it also appears that he was sole residuary legatee (*e*). On the former ground alone, the decision perhaps cannot be supported; for Lord Thurlow decided differently in a case nearly similar, although between three and four years had elapsed from the death of the testator to the transaction (*f*).

With respect to the second authority on this head (*g*), Lord Kenyon expressly dissented from it in the case of Bonney *v.* Ridgard (*h*); and in a late case (*i*), where an

(*a*) Nugent *v.* Gifford, 1 Atk. 463; and Mead *v.* Lord Orrery, 3 Atk. 235; and see Ithell *v.* Beane, 1 Ves. 215.

(*b*) Nugent *v.* Gifford.

(*c*) See 4 Bro. C. C. 136.

(*d*) See 7 Ves. jun. 107.

(*e*) See 17 Ves. jun. 163.

(*f*) Scott *v.* Tyler, 2 Dick. 724; 2 Bro. C. C. 431; and see 17 Ves. jun. 164.

(*g*) Meade *v.* Lord Orrery.

(*h*) 2 Bro. C. C. 433; 4 Bro. C. C. 130; 7 Ves. jun. 167, cited: and see Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*i*) Hill *v.* Simpson, 7 Ves. jun. 152; and see Lowther *v.* Lowther, 13 Ves. jun. 65; 17 Ves. jun. 169; and Cubbidge *v.* Boatwright, 1 Russ. 549.

executor, shortly after the decease of his testatrix, transferred stock, part of her estate, to his bankers, to secure a debt due from him, and future advances, the bankers swore that they did not know or suspect, that the funds were not the property of the executor, either as executor or devisee; and it appeared in evidence, that he represented himself as absolutely entitled to them, under the will, subject to a trifling annuity, and a few small legacies; although no fraud was proved, yet as gross negligence appeared in the bankers not inspecting the will, the funds were holden to be liable to the legacies given by the will.

It seems clear, therefore, that an executor cannot now dispose of his testator's property, as a security for, or in payment or satisfaction of his own debts.

In a late case, however, where a considerable time after the death of the testator, part of the assets were pledged with bankers as a security for monies advanced at the time, and future advances to the two acting executors; a bill filed by co-executors, who had not acted in the affairs of the testator, for delivery up of the assets, was dismissed, but without deciding what the equity would be if the title was nothing more than deposit, and the bill had been filed by a legatee (*k*).

3. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid (*l*), or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported (*m*).

(*k*) M'Leod *v.* Drummond, 14 Ves. jun. 353; 17 Ves. jun. 152; and see Farr *v.* Newman, 4 Term Rep. 621; Keane *v.* Roberts, 4 Madd. 332.

(*l*) See Ewer *v.* Corbet, 2 P. Wms. 148.

(*m*) Crane *v.* Drake, 2 Vern. 616; Vin. 43, pl. 13; 18 Vin. 121, pl. 11, side notes; Bonney *v.* Ridgard, 2 Bro. C. C. 438, cited; Nugent *v.* Gifford, 1 Atk. 463; and see Gilb. Eq. Rep. 113; Prec. Cha. 434; and Whale *v.* Booth, 4 Term Rep. 625, n.

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If one concerts with an executor, or legatee, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in *any other manner* (which Lord Eldon has said, are very material words) (*n*), contrary to the duty of office of executor, such concert will involve the seeming purchaser, and make him liable for the full value (*o*).

4. But if the legatee permit a long time to elapse without asserting his claim, and there are several mesne purchasers, equity will not set aside the sale, although there are suspicious circumstances of fraud (*p*).

5. And although the legatee has only a contingent interest, yet that will be no excuse for delay (*q*); because he has such an interest as will entitle him to know what debts the testator owed, and what part of his estate has been applied to the payment of them. And in Howorth *v.* Powell, it was laid down by Lord Keeper Henley, that a party having a claim in remainder to an estate, though not to the possession, if he sees the possession wrongfully usurped, ought to file his bill for relief before his right to possession accrues: for otherwise he stands by and countenances the possessor in his exercise of acts of ownership (*r*).

6. It remains to observe, that Lord Hardwicke thought (*s*) the reversal of the case of Humble *v.* Bill (*t*) might be proper, because the charge was upon a *parti-*

(*n*) 17 Ves. jun. 167.

(*o*) *Per* Lord Thurlow, 2 Dick. 725; and see 1 Burr. 475.

(*p*) Bonney *v.* Ridgard, 2 Bro. C. C. 438; 17 Ves. jun. 97, cited; and see 17 Ves. jun. 165.

(*q*) Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*r*) Ch. T. T. 1758, MS.; 1 Eden, 351, nom. Howarth *v.* Deem.

(*s*) See Mead *v.* Lord Orrery, 3 Atk. 241; and see 17 Ves. jun. 161, 162.

(*t*) *Supra*, p. 52.

cular part of the estate: his Lordship not, however, meaning to impugn the general doctrine, which he frequently admitted, and indeed carried farther than any other Judge.

This distinction Lord Hardwicke appears to have been inclined to follow in a case (*u*) where a specific legatee of a mortgage brought a bill to foreclose against the representative of the mortgagor, who pleaded an account settled between him and the executor of the mortgagee, and a release. For he thought the devisee had a specific lien on the estate, and as the mortgagor had notice of the bequest he was bound by it. And he was inclined to over-rule the plea of the release; but the case of Ewer *v.* Corbet (*x*) being cited, it was ordered to stand for an answer, with liberty to except. The case was afterwards debated on several days, and the Chancellor ultimately determined, that the plaintiff had not equity sufficient to support his bill, and accordingly dismissed it, but without costs (*y*).

Upon principle as well as upon the authority of Langley and Lord Oxford, the better opinion clearly is, that a particular chattel specifically bequeathed may be purchased from an executor, but certainly, in most cases, such a purchase could not be recommended without the concurrence of the legatee, because, independently of the general question, the executor may have assented to the bequest (*z*).

7. But of course this question cannot arise where the specific legatee of the chattel is also executor (*a*).

(*u*) Langley *v.* Earl of Oxford, Ambl. 17; and see Elliott *v.* Merryman, Barnard. Ch. Rep. 78; and Andrew *v.* Wrigley, 4 Bro. C. C. 125.

(*x*) *Supra*, p. 52.

(*y*) See Reg. Lib. B. 1747, fol. 300.

(*z*) See Thomlinson *v.* Smith, Rep. temp. Finch, 378.

(*a*) Taylor *v.* Hawkins, 8 Ves. jun. 209.

CHAPTER XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD FOR THE PURCHASE MONEY, IF NOT PAID.

I. WHERE a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be (*b*) (I) or be not (*c*) conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*d*), gives the vendor a lien on the land for the money; so, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced (*e*) (II).

And even where the agreement itself provides for the security of the purchase-money, by a bond to remain at interest during the purchaser's life, the seller will not lose

(*b*) Chapman *v.* Tanner, 1 Vern. 267; Pollexfen *v.* Moore, 3 Atk. 272; and see 1 Bro. C. C. 302, 424; and 6 Ves. jun. 483; Mackreth *v.* Symmons, 15 Ves. jun. 329.

(*c*) Smith *v.* Hibbard, 2 Dick. 730; Charles *v.* Andrews, 9 Mod. 152; Topham *v.* Constantine, 1 Taml. 135.

(*d*) Winter *v.* Ld. Anson, 3 Russ. 488.

(*e*) Lacon *v.* Mertins, 3 Atk. 1. See Oxenham *v.* Esdaile, 2 You. & Jerv. 493, 3 You. & Jerv. 262.

(I) But note, that in Chapman *v.* Tanner (see Ambl. 726; 6 Ves. jun. 757), and Pollexfen *v.* Moore, there were special agreements that the vendor should keep the writings. Indeed, in the latter case, possession had not been delivered. See Mr. Sanders's note to the case in his edition of Atkins.

(II) As to chattels capable of delivery, as timber felled, see *ex parte* Gwyne, 12 Ves. jun. 379.

his lien. The case was held not to be distinguishable from the common case of an agreement, made after the written agreement, to take a bond (*f*). But this point, upon the case again coming on, was decided the other way, and the lien was held not to exist (*g*). Upon appeal, the Lord Chancellor reversed the latter decision (*h*), and from his decision an appeal was lodged in the House of Lords, but it has since been withdrawn.

Upon the authority of this case, Clarke *v.* Royle was decided (*i*). There the estate was conveyed in consideration of the purchaser's covenants, and he covenanted to pay an annuity to the seller for his life; and in case he (the purchaser) married, to pay 3,000 *l.* to certain persons, in such manner as the seller should think fit; and it was held that the purchaser had no lien for the annuity, and that there was none for the 3,000*l.* The Vice-Chancellor said, that it appeared to him that Lord Eldon, in Mackreth *v.* Symmons, expressly over-ruled the decision in Tardiffe *v.* Scrugan. Besides, the case now before him was not similar to Tardiffe *v.* Scrugan, for in that case there was simply a bond given for the annuity; but here the parties expressly recite, that *A* had agreed to convey the estates to *B*, in consideration of his entering into the covenant for payment of the annuity, and in consideration of his entering into the other covenant thereinafter contained. So that the release states distinctly the two circumstances that form the consideration; and then it is witnessed, that in consideration of the covenants of *B*, in the indenture contained, *A* conveys the premises to him. And then it is further witnessed, that in pursuance of the agreement on the part of *B* for entering into such covenants as aforesaid, &c. So that

(*f*) Winter *v.* Lord Anson, V.C. 27 Nov. 1821, MS.

(*g*) 1 Sim. & Stu. 434.

(*h*) 3 Russ. 488.

(*i*) 3 Sim. 499.

the deed plainly marks out that the consideration on the one side was the conveyance of the estate, and on the other the entering into the covenants. Then why was he to declare, that in respect of this annuity, and of the sum which was payable on a contingency, and which therefore never might be payable, there was to be a lien on the purchased estates? Why should he go farther than any of the cases that had been hitherto decided upon the subject of lien on purchased estates, and do that which appeared to be contrary to the intention of the parties? His Honor considered that this case was decided by the authority of Winter *v.* Lord Anson.

A stipulation that the purchase-money should be repaid within two years *after a resale*, was held to discharge the vendor's lien (*k*).

But equity would not raise this equitable lien in favour of a papist incapable of purchasing (*l*), for that would have given him an interest in land.

If a vendor take a distinct and independent security for the purchase-money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money (*m*).

Thus, upon the sale of an estate, the vendor accepted some stock for the money (*n*), with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up that sum. The stock proved deficient; and Sir William Grant held, that the vendor had no lien on the estate for the deficiency: he thought that the vendee could not have any motive for

(*k*) *Ex parte* Parkes, 1 Glyn & Jam. 228.

(*l*) Harrison *v.* Southcote, 2 Ves. 389. See now 10 Geo. 3.

(*m*) See 6 Ves. jun. 483; and see the observations of Lord Eldon on this case in 15 Ves. jun. 348, 349.

(*n*) Nairn *v.* Prowse, 6 Ves. jun. 752; but see Lord Eldon's observations, *post*.

parting with his stock, but to have the absolute dominion over the land. It was impossible, his Honor said, that it could be intended that the vendor should have this double security, an equitable mortgage and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money.

And the same rule must, it has been said, prevail where a vendor accepts a mortgage of another estate for the purchase-money, the obvious intention of burthening one estate being, that the other shall remain free and unincumbered (*o*); so, even where the vendor takes a mortgage of the estate sold for only part of the purchase-money; because, by taking a mortgage for part, he clearly evinces his election, that the estate should be charged with that part only (*p*).

Lord Eldon, however, has said, that it did not appear to him a violent conclusion as betwen vendor and vendee, that notwithstanding a mortgage, the lien should subsist (*q*). It must not, he added, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended, as he could put many instances, that a mortgage of another estate for the purchase-money, would not be decisive evidence of an intention to give up the lien, though in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the pur-

(*o*) See Nairn *v.* Prowse; but see 15 Ves. jun. 341; 2 Ball & Beat. 515.

(*p*) Bond *v.* Kent, 2 Vern. 281. See 1 Scho. & Lef. 138.

(*q*) See 15 Ves. jun. 341; and see Cowell *v.* Simpson, 16 Ves. jun. 278, 280.

chaser, by permitting him to have the chance of the benefit, therefore gives up the lien which he has? The doctrine, as to taking a mortgage or pledge, would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge, therefore necessarily gives up another, which must, his Lordship thought, be laid down upon the circumstances of each case, rather than universally (*r*).

A bond, and a mortgage of *part* of the estate, have been held to exclude the lien over the rest of the estate (*s*).

But it seems, that taking a covenant, bond or note, for the purchase-money, will not affect the vendor's lien.

This was settled by the case of Hearne *v.* Botelers (*t*), where a bond was taken for the money, and some of it remained unpaid, and the bond was lost; for the opinion of the Court was to charge the defendants, *in regard of the land in their possession*, with the payment thereof; on the ground, it should seem, that taking a bond did not deprive the vendor of his equitable lien; for unless he had such a lien, the loss of the bond would hardly be a ground to charge the money on the estate (*u*).

So, in Gibbons *v.* Baddall (*x*), it was said, that if *A* sells an estate, and takes a promissory note for part of the purchase-money, and then the purchaser sells to *B*, who has notice that *A* had not received all his purchase-money, the land in equity is chargeable in the hands of *B*, with the money due on the note. In this case, therefore, the

(*r*) Mackreth *v.* Symmons, 15 Ves. jun. 348, 349.

(*s*) Capper *v.* Spottiswoode, 1 Taml. 21.

(*t*) Cary's Rep. Cha. 25; and see Tardiff *v.* Scrughan, 1 Bro. C. C. 422, cited; and Harrison *v.* Southcote, 2 Ves. 389.

(*u*) But see 15 Ves. jun. 338, 343, *per* Lord Eldon.

(*x*) 2 Eq. Ca. Ab. 682, n. (b) to (D.); *Ex parte* Peake, 1 Madd. 346.

existence of the equitable lien was considered as a point perfectly settled.

But in Fawell *v.* Heelis (*y*), where a receipt was indorsed on the deed for the purchase-money (I), although it was not actually paid, and the vendor took a bond for the purchase-money, Lord Bathurst held that he had thereby departed with his lien. He said, he did not find an instance where a bond had been taken for the consideration-money (*z*). It was evident the vendor had an opinion of the purchaser at the time, otherwise he would not have let the money remain in his hands. I consider it, he added, as a transaction distinct, and independent of the purchase: he lends him the money, and he chooses his security, and I think he must abide by it; therefore let the bill be dismissed.

In a subsequent case (*a*), however, Lord Rosslyn was decidedly of opinion against the doctrine laid down by Lord Bathurst. After commenting on other cases, he said, the case of Fawell and Heelis remained; there Lord Bathurst doubted whether there was such an equitable lien; it became, therefore, of great consequence that it should be spoken to. It struck him always, he said, that there was such a lien, and that it was so from the founda-

(*y*) Ambl. 724; 1 Bro. C. C. 421, n.; 2 Dick. 485.

(*z*) *Vide* Heale *v.* Botelers, and Gibbons *v.* Baddall, *ubi supra*.

(*a*) Blackburn *v.* Gregson, 1 Cox, 90; 1 Bro. C. C. 420; and see Tardiffe *v.* Scrughan, *ibid.* 423, cited; and 15 Ves. jun. 336, 337.

(I) This of course could not make any difference in the case, for a receipt for the purchase-money, although signed by the seller, is in equity of no avail if the money be not actually paid. See Coppin *v.* Coppin, 2 P. Wms. 291; but at law the receipt cannot be got over, Rowntree *v.* Jacob, 2 Taunt. 141, unless merely fraudulent, Henderson *v.* Wild, 2 Campb. 561; see Lampon *v.* Corpe, 5 Barn. & Ald. 606; 1 Dowl. & Ryl. 211, S. C.; and in equity payment will be presumed after a great length of time, Bidlake *v.* Arundel, 1 Cha. Rep. 93.

tion of the court. A bargain and sale must be for money paid. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, was it not the same as to that which was unpaid?

In the late case of Nairn *v.* Prowse (*b*), the Master of the Rolls seemed to incline to the same opinion. He said, that by conveying the estate without obtaining payment, a degree of credit was necessarily given to the vendee. That credit might be given upon the confidence of the existence of such a lien. The knowledge of that might be the motive for permitting the estate to pass without payment. Then it may be argued, that taking a note or bond cannot materially vary the case. A credit is still given to him, and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance.

And in a case where a receipt was given for the whole purchase-money, but part was retained, and a promissory note given for it to a trustee for the vendor, there being debts affecting the estate, the amount of which was not ascertained, Lord Redesdale held, that it lies on the purchaser to show that the vendor agreed to rest on the collateral security; *primâ facie* the purchase-money is a lien on the lands. In this case, he said, that the purchaser's note was nothing but a mere memorandum, put into the hands of a trustee, to enable the purchaser first to pay off incumbrances, and then to be subject to an account, and the balance only to be received by the vendor. It cannot be considered that the vendor relied on it *as a security*. Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall, his Lordship asked, the acceptance of such

(*b*) 6 Ves. jun. 752.

bills discharge the vendor's lien? They are taken, he added, not as a security, but as a mode of payment (*c*).

And in a late case, where the purchase-money was paid by bills drawn by the purchaser and accepted by him *and his partner*, payable to the seller's order, Sir Wm. Grant, Master of the Rolls, determined that the lien was not gone (*d*). It was insisted, that by taking bills accepted by the partnership, the vendor got the security of a third person, which must be considered as a substitution for the lien. His Honor observed, that what might be the effect of a security, properly so denominated, of a third person, had never, he believed, been absolutely determined; but he perfectly concurred in the opinion expressed by Lord Redesdale in Hughes *v.* Kearney (*e*), that bills of exchange are to be considered not as a security, but merely as a mode of payment. That is obvious from attending to the nature of a bill of exchange; it is an order by the drawer for the payment of money which he has in the hands of the drawee to the holder of that bill. The acceptor, by his acceptance, acknowledges that he has money belonging to the drawer in his hands, and engages to have that money forthcoming according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another. By accepting he admits himself to be a debtor to the drawer. The subject of the bill is, in contemplation of law, the drawer's own money, which he authorizes the creditor to receive instead of receiving it himself, and afterwards handing it over to such creditor.

And in such cases it is not important that the note or bill has been negotiated (*f*).

(*c*) Hughes *v.* Kearney, 1 Scho. & Lef. 132.

(*d*) Grant *v.* Shills, 2 Ves. & Bea. 306.

(*e*) 1 Scho. & Lef. 132. See 136.

(*f*) *Ex parte* Loaring, 2 Rose, 79. But it is otherwise at law upon a sale of goods, Burney *v.* Poyntz, Nev. & Shann. 229.

The same point seems to have been decided in Comer *v.* Walkley (*g*). A trustee sold an estate for 720*l.*: 600*l.* was left in the purchaser's hands as an indemnity against an annuity; and a deed was entered into between him and the trustee, whereby he covenanted to pay interest on the 600*l.*, and when the annuity should cease or be discharged, to pay the money to the trustee. By several conveyances, &c. the estate became again vested in trustees, upon trust to sell; and they sold the estate to a purchaser, who objected to complete his contract without the concurrence of the person entitled to the residue of the 600*l.* then unpaid. Two bills were filed, one by the person entitled to the residue of the 600*l.* against the purchaser and others, for payment of it; and the other by the purchaser, who had been in possession twenty-two years, for a specific performance, which was accordingly decreed, and his costs in both causes were allowed. The proper accounts of the personal estate were directed to be taken in the first cause, but the question, out of what estates any deficiencies should be made good, was reserved: so that it does not appear that the Court held the money to be a lien on the land any further than by giving the purchaser his costs in both causes; which circumstance alone is, however, conceived to be decisive. And the question has received the same decision in a recent case before Lord Eldon, after an elaborate review of all the authorities (*h*).

Upon the whole, therefore, it seems quite clear, that taking a covenant, bond or note, for the purchase-money, or any part of it, will not discharge the vendor's equitable lien on the estate. And it seems that the same rule must

(*g*) Reg. Lib. A. 1784, fol. 625; *vide supra*, p. 46.

(*h*) Mackreth *v.* Symmons, 15 Ves. jun. 329. The case was afterwards reheard by Lord Chancellor Eldon, with the assistance of two Judges, but judgment was not given.

prevail although the estate is sold for an *annuity*, and a covenant, bond or note is taking for securing the payment of it (*i*).

In Elliot *v.* Edwards (*k*), the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase-money. The purchaser, and another person as his surety, covenanted for payment of the residue of the purchase-money; and in the assignment was contained a proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion, that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate. But if a third person advance part of the purchase-money to the vendor, and he is in effect made a mortgagee of the estate, his right will prevail over the vendor's lien (*l*).

In Blackburn *v.* Gregson (*m*), Lord Rosslyn, as we have seen, said, that if an estate is sold, and no part of the money paid, the vendee is a trustee: from which it might perhaps be inferred, that a vendor has always an equitable lien where *no part* of the purchase-money is paid: but this cannot be considered as a general rule; it being clear, that a vendor may depart with his lien, although no part of the purchase-money be paid. Indeed the same rules seem to prevail on this subject, whether the whole or only part of the purchase-money remains unpaid.

Where a security by bond or note is given for the purchase-money, and it is intended that the vendor shall

(*i*) See Tardiffe *v.* Scrughan, 1 Bro. C. C. 423, cited; but see Mackreth *v.* Symmons, 15 Ves. jun. 329, which, however, was a very particular case; and see Clarke *v.* Royle, *sup.* p. 58.

(*k*) 3 Bos. & Pull. 181.

(*l*) Wood *v.* Pollard, 9 Price, 544.

(*m*) 1 Bro. C. C. 424.

not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance; which would effectually prevent equity from raising a lien upon the *presumed* intention of the parties.

II. It must be remarked, that although equity raises this lien in favour of a vendor, yet it is not extended to third persons; that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate; or, in other words, cannot require the purchased estate and the personal estate to be marshalled.

Thus, in the case of Coppin *v.* Coppin (*n*), a younger brother purchased an estate of his elder brother, but part of the purchase-money was not paid. The purchaser made his will, charging his estate with great legacies; but the will was attested by only two witnesses; afterwards the purchaser died, leaving his brother, the vendor, his heir and executor; and it was holden by Lord Chancellor King, that he had an equitable lien on the land; that he was entitled to retain the purchase-money out of the assets; and that the legatees could not stand in his place with respect to the equitable lien.

There is an important case on this subject, which demands particular attention. The case to which I allude is Pollexfen *v.* Moore (*o*). It appeared that Thomas Moore purchased an estate from Pollexfen, and had not paid all the purchase-money; he devised the estate to Kemp, and, subject to some legacies, made Kemp his residuary legatee and executor. Kemp wasted the personal estate and died; whereupon the purchased estate

(*n*) Coppin *v.* Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

(*o*) 2 Atk. 272.

descended to Boyle Kemp, his son and heir at law. Pollexfen filed his bill for payment of the remainder of the purchase-money. Mrs. Moore, a legatee in Thomas Moore's will, brought a cross-bill, praying that if the purchase-money should be paid out of the personal estate, she might stand in the purchaser's place as to his lien on the land. Lord Harwicke admitted that Pollexfen had a lien on the estate for the remainder of the purchase-money. But he said, that this equity would not extend to a third person, but was confined to the vendor and vendee only; and if the vendor should exhaust the personal assets of Moore and Kemp, the defendant would not be entitled to stand in his place, and to come upon the purchased estate in the possession of Kemp's heir. But then the heir should not avail himself of the injustice of his father, who had wasted the assets of Moore, which should have been applied in paying the defendant's legacy. Therefore, Lord Hardwicke added, that the estate which had descended from Kemp, the executor of Moore, upon Boyle Kemp, came to him liable to the same equity as it would have been against the father, who had misapplied the personal estate; and in order to relieve Mrs. Moore, he would direct Pollexfen to take his satisfaction upon the purchased estate, because he had an equitable lien both upon the real and personal estate; and would leave this last fund open, that Mrs. Moore, who could at most be considered only as a simple-contract creditor, might have a chance of being paid out of the personal assets.

The decree was general, that the residue of the purchase-money and interest should in the *first place* be paid out of the personal estate of the said Thomas Moore; but that in case it should appear that Moore did not leave assets to pay what should be so due for the residue of the purchase-money, *and all his other debts, legacies and*

funeral expenses; or if the personal estate of Moore was not then sufficient, by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, "*so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase-money* (I)," should be made good out of the purchased estate, and a competent part thereof was decreed to be sold accordingly.

Now in this case Lord Hardwicke, in giving judgment, clearly agreed with the decision in Coppin *v.* Coppin, that this equity did not extend to a third person. According to the judgment, his Lordship deviated from that rule in the case before him, on the ground of fraud. But Lord Hardwicke's decree cannot be satisfactorily accounted for on this narrow ground. The decree was, that if Thomas Moore (the original purchaser) did not *leave* assets to pay the residue of the purchase-money, *and all his debts, funeral expenses, and legacies,* then the purchased estate and the personal estate should be marshalled, so as to let in the simple-contract creditors and legatees. This could not be on account of the fraud in Kemp, the devisee and executor.

It appears by the Registrar's book, that Pollexfen had not delivered the title-deeds and conveyance of the estate to the purchaser, but had by agreement kept them in his own custody as a security for the purchase-money unpaid;

(I) The decree has generally been considered at variance with the judgment. In the first edition of this work, the author stated, that he could not see the principle upon which the decree was made, if it were correctly stated, that if the purchaser did not leave assets to pay the purchase-money, *and all his debts, funeral expenses, and legacies,* the deficiency was to be made good out of the purchased estate. See 3 Atk. 273, n. 3, last edition. Upon searching the Registrar's book, it appears that the decree was qualified as stated in the text; and this emendation, with the observations in the text, will, it is hoped, conduce to a right understanding of this case. See Reg. Lib. B. 1745, fol. 283.

and he strongly insisted by his bill, that he never intended the deeds to have operation till all the money was paid (*p*). And this, it is apprehended, must have been the ground on which the decree was pronounced. The seller had an equitable mortgage on the estate, and the case therefore came within the general rule, as to marshalling (*q*).

Thus explained, the case of Pollexfen *v.* Moore does not in the least clash with Coppin *v.* Coppin, but appears to establish an important distinction on this subject, viz. that where the purchaser has an equitable mortgage on the estate, or in case of fraud, the purchased estate and the personal estate may be marshalled in favour of simple-contract creditors and legatees.

The general question under discussion arose in a case before Lord Eldon, but it was not necessary to decide it. Pollexfen *v.* Moore, as reported, was the only case cited. The Lord Chancellor assimilated the lien to a charge, and said, that the cases of marshalling seem to have gone this length: that, where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate. His Lordship, however, gave no opinion upon the point, although it is clear that the inclination of his opinion was in favour of the legatee under the general rule (*r*). In a still later case the very point came before Sir Wm. Grant, Master of the Rolls, and called for a decision (*s*). The only case cited was Pollexfen *v.* Moore, as reported

(*p*) Reg. Lib. B. 1745, fol. 283.

(*q*) Lutkins *v.* Leigh, For. 53; Aldrich *v.* Cooper, 8 Ves. jun. 397. In my copy of Forrester, Holdsworth *v.* Holdsworth, Hil. 23 Geo. III. on appeal from the Rolls, is referred to; and see O'Neal *v.* Mead, 1 P. Wms. 693, and the cases in the note.

(*r*) See Austen *v.* Halsey, 6 Ves. jun. 475; and see Cox's n. (1) to 2 P. Wms. 295.

(*s*) Trimmer *v.* Bayne, 9 Ves. jun. 209; and see Headley v. Roadhead, Coop. 50.

in Atkyns. His Honor said, that it was a very obscure report; and it had perplexed him very much formerly. The decision was against that *dictum* of Lord Hardwicke. This could not be distinguished from the common case of marshalling; that a person having resort to two funds shall not by his choice disappoint another, having one only: and a decree was pronounced accordingly.

The reader will observe, that the case of Coppin *v.* Coppin was not cited in either of the foregoing cases; and should the observations which have been made on Pollexfen *v.* Moore be thought correct, it would seem that Lord Hardwicke's decision was not in opposition to his *dictum* in the same case, expressive of the rule established by Lord Chancellor King. Perhaps the common case of marshalling may be thought not to apply to the point in question, when it is considered that the equitable lien was originally raised *by the construction of equity in favour of the vendor only*, and not in favour of third persons. It seems to have been thought in Coppin *v.* Coppin, and apparently with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. The general rule as to marshalling applies to cases where the person resorting to the personal estate has an actual charge or lien on the real estate: but in this case, if *equity* first deems the purchaser a trustee for the vendor as to so much of the estate as will satisfy the purchase-money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds. On sale of the estate, the purchase-money becomes a debt payable out of the purchaser's personal estate; and the equitable lien ought, it is conceived, to be extended to so much only of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the

estate, but only an equity to resort to it, in case the personal estate prove deficient. In this view of the case an independent substantive charge on the land is, in fact, created by equity in favour of a legatee, although, if the legacy was actually imposed on the estate by a will not duly executed according to the statute of frauds, the Court is bound to say, that the will cannot be read as to the charge.

It is with great deference that these observations are submitted to the reader, after the high opinions which have been given upon this point; but as the case of Coppin *v.* Coppin was not cited in the recent cases, and the effect of a decision over-ruling that of Lord Chancellor King, does not appear to have presented itself to the mind of the Court, it still seems open to contend, that the equity under consideration cannot be extended to a third person, unless by reason of a fraud, or on the ground of the vendor having an equitable mortgage on the estate.

Since these observations were written, Lord Eldon, in deciding the general question of lien, observed that he had some doubt upon another point, whether the Court will in case of the death of the vendee marshal the assets, so as to throw the lien on the purchased estate. It has been often said, and the case of Coppin *v.* Coppin stated as an authority, that a Court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the heir happened to be the heir of the vendee, so that the estate was at home, and it was held that being also the executor, he was entitled to retain the purchase-money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application, and the express terms

of the decree in Pollexfen *v.* Moore might be found very inconsistent with it (*t*). On a subseqent occasion, Lord Eldon observed (in allusion to Lord Hardwicke's observation in Pollexfen *v.* Moore, before noticed), that if the meaning was that he (Lord H.) would follow the case of Coppin *v.* Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleases: having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied, and in that respect, with reference to the principle, the case is anomalous (*u*).

In the late case of Selby *v.* Selby, the Master of the Rolls decided that the assets should be marshalled against the devisee in favour of simple-contract creditors (*x*).

III. The observation of Lord Hardwicke before noticed, that this equity would not extend to a third person, but was confined to the vendor and vendee only, is frequently adduced to prove, that the lien does not exist when the estate passes into the hands of a third person; but by the latter part of the same passage (*y*), it clearly appears, that this was not Lord Hardwicke's meaning; and in Walker *v.* Preswick (*z*), Lord Hardwicke said, that this lien prevailed against the purchaser, his heir, or any claiming under him, with notice of this equitable title; which evinces his meaning to be, that the purchased estate, and the personal estate of the purchaser, could not be marshalled in favour of a third person, although, as we have

(*t*) 15 Ves. jun. 338, 339.
(*u*) 15 Ves. jun. 345.
(*x*) 4 Russ. 336.
(*y*) *Vide supra*, p. 68.
(*z*) 2 Ves. 622.

seen, he allowed it in Pollexfen *v.* Moore, by reason of the equitable mortgage.

It appears then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration (*a*).

But it of course would not prevail against a *bonâ fide* purchaser without notice: and the mere deduction of the title to the estate from the first vendor by recital, will not be sufficient to affect him, for that does not show it was not paid for (*b*).

Persons coming in under the purchaser by act of law, as assignees of a bankrupt (*c*), are bound by an equitable lien, although they had no notice of its existence; because, as Sir William Grant observed on another point, the assignment from the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. Even where (as in this instance) a complete legal title vests in them, and there is notice of an equity affecting it, they take, subject to whatever equity the bankrupt was liable to (*d*).

In some cases by force of the seller's lien, the Court can at once sell the estate and pay the purchase-money to the seller (*e*).

But where a trustee for infants, to sell the lease of a brewhouse, plant and fixtures, contracted to sell them and let the purchaser into possession, and upon a bill filed by

(*a*) Hearle *v.* Botelers, Cary's Cha. Rep. 25; Walker *v.* Preswick, 2 Ves. 622; Gibbons *v.* Baddall, 2 Eq. Ca. Abr. 682, n. (b) to (D); Elliot *v.* Edwards, 3 Bos. & Pull. 181; Mackreth *v.* Symmons, 15 Ves. jun. 329.

(*b*) See 1 Bro. C. C. 302.

(*c*) Blackburne *v.* Gregson, 1 Bro. C. C. 420; Bowles *v.* Rogers, 6 Ves. jun. 95, n. (*a*); *Ex parte* Hanson, 12 Ves. jun. 346.

(*d*) See 9 Ves. jun. 100; 2 Ves. & Bea. 309.

(*e*) *Supra*, Vol. 1, p. 439.

the trustee there was a decree for a specific performance, but the purchaser became bankrupt before the money was paid, the Vice-Chancellor held that there was no lien against the plant, which fell within the provision of the 21 Jac. 1. c. 19 (*f*).

And creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees (*g*), because they stand in the same situation as creditors under a commission.

In Nairn *v.* Prowse (*h*) the question arose, whether the lien of which we are now treating, should prevail against an equitable mortgage, by deposit of title-deeds; but the case went off on another ground, and the point was not decided. In Stanhope *v.* Earl Verney (*i*), Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an actual assignment; unless a subsequent incumbrancer, *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.

Now it must at one view be seen how strong the analogy is between the point in question and this case. The only difference between them appears to be, that in the case before Lord Northington, both the trusts were declared by the parties; whereas in the case under consideration, the trust or lien is raised by equity, and not by express declaration, and the trust or equitable mortgage

(*f*) *Ex parte* Dale, 1 Buck, 365.

(*g*) Fawell *v.* Heelis, Ambl. 724; and see 1 Bro. C. C. 302.

(*h*) 6 Ves. jun. 752; see 2 Ves. & Bea. 149.

(*i*) Butler's note, (1) to Co. Litt. 290 b, Ch. July 27, 1761; see and consider Frere *v.* Moore, 8 Price, 475.

is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favour of the mortgagee: so that, upon the authority of this case, we may perhaps venture to say, that an equitable mortgage, by deposit of deeds to a person, *bonâ fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien on the estate for any part of the purchase-money (*k*).

A deposit of title-deeds by a simple-contract debtor of the Crown, for securing part of the purchase-money for another estate, binds the Crown as an equitable mortgage, although the purchaser also give his bond to the seller for the money (*l*).

Before closing this subject it may be observed, that if a purchaser deposit the deeds with a third person, as a collateral security for part of the purchase-money, the seller, although he obtain possession of the conveyance to him from the depositary, and pledge it to persons who advance money upon it *bonâ fide*, cannot give them a lien beyond the amount of the purchase-money actually unpaid (*m*).

(*k*) In Mackreth *v.* Symmons, 15 Ves. jun. 329, there was no deposit of the deeds.

(*l*) Casberd *v.* Ward, 6 Price, 411; Fector *v.* Philpott, 12 Price 197.

(*m*) Hooper *v.* Ramsbottom, 4 Camp. Ca. 121; 6 Taunt. 12; Harrington *v.* Price, 3 Barn. & Adolph. 170.

CHAPTER XIII.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

SECTION I.

Where they run with the Land.

IN a preceding chapter we have seen to what covenants a purchaser is entitled (*a*); and we are now to consider the construction of covenants entered into by a vendor.

Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor and his real and personal representatives (*b*) (I). And as the covenants relate to the land, it seems that an assignee may maintain an action on the covenants, although the

(*a*) Ch. 9.

(*b*) Middlemore *v.* Goodale, 1 Ro. Abr. 521, (K.) pl. 6; Cro. Car. 503. 505; Sir Wm. Jones, 406; Campbell *v.* Lewis, 3 Barn. & Ald. 392; Lewis *v.* Campbell, 8 Taunt. 715.

(I) A respectable writer has observed, that *cestuis que use* are grantees within the statute 32 Hen. VIII. c. 34; and are therefore entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands, 4 Cruise's Dig. p. 80, s. 44. The statute of Henry, however, appears to relate only to covenants which are a charge upon or incident to reversions; and a purchaser of a reversion is under this act clearly entitled to the benefit of covenants entered into by a lessee with the vendor, although the estate is vested in him by way of use under the statute of uses; because this last statute puts him in the place of his feoffee. Lee *v.* Arnold, 4 Leo. 27; S. C. Mo. 97, nom. Appowel *v.* Monnoux; Roll *v.* Osborne, Mo. 859. Where an estate is upon a purchase conveyed to *A* to uses, the covenants for title ought to be entered into with *A*. The statute of uses will of course turn the uses into possessions, and the *cestuis que trust* will then

covenants were entered into with the original grantee and his heirs only (*c*); and the right of action, even for a breach in the ancestor's life-time, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor (*d*). So covenant will lie by the devisee of lands in fee, though broken in the testator's life-time. For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require (*e*).

And as covenants entered into by a vendor with a purchaser run with the land in the possession of his representatives or assignees, so on the other hand covenants entered into by a purchaser with the vendor, respecting the land, will also run with the land, and charge the representatives or assignees of the purchaser in respect of it.

It is not, however, sufficient that a covenant is concerning the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties (*f*). Therefore, it seems that if the estate was,

(*c*) Co. Litt. 884 b; 385 a; Spencer's case, 5 Rep. 16; Bally *v.* Wells, 3 Wils. 25; Tatem *v.* Chaplin, 2 H. Blackst. 133.

(*d*) Kingdon *v.* Nottle, 1 Mau. & Selw. 355; King *v.* Jones, 5 Taunt. 418; 1 Marsh. 107; 4 Mau. & Selw. 188.

(*e*) Kingdon *v.* Nottle, 4 Mau. & Selw. 53.

(*f*) *Per* Lord Kenyon, Webb *v.* Russell, 3 Term Rep. 393; Stokes *v.* Russell, *ibid.* 678; affirmed in the Exchequer Chamber, 1 H. Blackst. 362; see 3 Barn. & Adolph. 591.

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be deemed assignees, and may take advantage of the covenants by force of the common law, just as if the statute of uses had not been passed, and the estate had been conveyed to them at once by *A.* This, therefore, appears to be wholly independent of the statute of 32 Hen. VIII.

at the time of the conveyance, mortgaged in fee, and the purchaser should enter into a covenant respecting the land with the vendor, the covenant would not bind the assignees of the land, but would be a mere covenant in gross; for the vendor would, in contemplation of law, be a mere stranger, and consequently there could be no privity of estate between him and the purchaser.

And even where there is a privity of estate at the time of the covenant, yet if a subsequent purchaser do not take the estate of the original purchaser, he will not be bound by the covenant. It seems difficult to conceive that this case can exist. It occurred, however, in the late case of Roach *v.* Wadham (*g*); an estate was conveyed to such uses as the purchaser should appoint; and in default of appointment, to himself in fee, yielding and paying to the vendors, their heirs and assigns, a perpetual fee-farm rent, which rent the purchaser, for himself, his heirs and *assigns*, covenanted to pay; the estate was afterwards conveyed to a purchaser; and as it was holden that the purshaser was in under the power, and not by virtue of the first purchaser's estate, it was admitted, on all hands, that an action brought against him by the original vendor, for the fee-farm rent, was not maintainable, for he had not the estate of the first purchaser, but took as if the original conveyance had been made to himself. This decision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower.

The proposition before stated, that it is not sufficient that a covenant is concerning the land, but, in order to

(*g*) 6 East, 289.

make it run with the land, there must be a privity of estate between the covenanting parties, seems to apply as well to covenants entered into by a vendor, as to covenants entered into by a purchaser. But the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere *cestui que trust*; and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace.

It seems impossible to get over the objection, by the *form* of the covenant; for although the vendor covenant with the purchaser, his heirs and *assigns*, yet the assignee of the lands will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law (*h*). The only mode by which the difficulty can be avoided is, to require the vendor to take a conveyance to himself in fee, or to the usual uses to bar dower, previously to executing a conveyance to the purchaser; and this, I believe, has been sometimes done since it was first suggested in this work. If, indeed, the objection should be thought to exist, it might also be thought, that where the vendor conveys the estate to the purchaser under the usual power of appointment, the covenants will not run with the land: but this, it is conceived, would be carrying the rule much too far; and there seems to be some ground to contend, that even in Roach *v.* Wadham, as the power was coupled with an interest, the second purchaser might have been held to have come in under, and to stand in the place of the first purchaser, so as to satisfy the rule of law, although he did not actually, as it was

(*h*) See Tempest's case, Clayt. 60; and see Palm. 558, and Roach *v.* Wadham, *ubi sup.*

determined, take the estate of the first purchaser (*i*). The point, however, was considered as clear, and was not discussed either at the bar or upon the bench (I).

SECTION II.

Of their general Construction.

It hath already been observed (*k*), that the covenants usually entered into by a vendor seised of the inheritance, are, 1st, that he is seised in fee: 2dly, that he has power to convey: 3dly, for quiet enjoyment by the purchaser, his heirs and assigns: 4thly, that the land shall be holden free from incumbrances: and lastly, for further assurance.

The five covenants are several and distinct, but the first and second of them are synonymous; for if a man be seised in fee, he has power to sell (*l*). But the converse of this proposition is not universally true (*m*).

A man having merely a power to appoint an estate, cannot be said to be seised in fee of the estate, although he has a right to convey: and accordingly, in cases of this nature, it is usual to omit the first covenant, and to insert a covenant that the power was well created, and is not suspended or extinguished.

(*i*) See and consider Co. Litt. 215 b. s. 10; Glover *v.* Cope, 1 Show. 284; Hurd *v.* Fletcher, Dougl. 43; Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 61; and see 3 Wils. 26, at the bottom.

(*k*) *Supra*, ch. 9.

(*l*) Nervin *v.* Munns, 3 Lev. 47; Browning *v.* Wright, 2 Bos. & Pull. 13.

(*m*) See 4 Cruise's Dig. 78, s. 30.

(I) As the case of the Duke of Bedford *v.* the Trustees of the British Museum, which contains some important doctrine on this head, has not been reported, I have extracted the material points from the briefs and shorthand writer's notes. App. No. 22.

Covenants for title are either general and unlimited, extending to the acts of all the world, or limited and restricted to the acts of certain persons named in the deed; and under this branch of our subject we may consider, 1st, to what and against whose acts general and limited covenants extend: 2dly, in what cases restrictive words shall or shall not extend to all the covenants in the deed: and 3dly, to what remedy a purchaser is entitled under covenants for the title, in case he is evicted, or the title prove bad.

I. First then, 1. Although covenants are general and unlimited, and are not restricted to the acts of persons claiming lawfully, yet it is now, perhaps, settled (*n*), although the contrary was formerly holden (*o*), that such a covenant shall not extend to a tortious eviction, but to evictions by title only; because the law itself defends every one against a wrongful entry; and, therefore, if a purchaser be disturbed in his possession by a person having no title, he has a remedy at law against the wrong doer; and if he be legally evicted, he may recover against the vendor, in an action on the covenant. Lord C. J. Vaughan (*p*) adduces the four following reasons why the covenants should not extend to tortious evictions: 1. It is unreasonable, as the vendor cannot prevent the entry; 2. the vendee has his remedy against the wrong-doer, and therefore ought not to charge an innocent person; 3. the vendee would have a double remedy for the same injury;

(*n*) Dudley *v.* Foliott, 3 Term Rep. 584. See Dy. 238 a, marg.; and Crosse *v.* Young, 2 Show. 425, and the cases cited in the note to 3 Term Rep. 587; in some of which, however, the point was not decided, but a distinction was taken between *express* and *implied* covenants.

(*o*) Mountford *v.* Catesby, Dy. 328 a. See 1 Ro. Abr. 430, pl. 12; Shep. Touch. 166, 170; Anon. 1 Freem. 450, pl. 612; Anon. 2 Ventr. 46; Anon. Loft. 460.

(*p*) Vaugh. 122.

4. it might open a door to fraud, for the purchaser might secretly procure a stranger to make a tortious entry, that he might charge the covenantor with an action. And there is a case in the year-books in the reign of Hen. 8. where the question was, whether a general covenant in a lease should extend to an eviction by one who had no right. Englefield said, that he should not have a writ of covenant against his lessor when he is ousted by tort, for there is no mischief, because he may have a writ of trespass, or an *ejectione firmæ* against the person who ousted him; but if he was ousted by one who had a title paramount against whom he could have no relief, then he may have a writ of covenant against his lessor, *Quod fuit concessum per plusieurs* (*q*).

2. But where a vendor covenants to indemnify a purchaser against a particular person by name, there the covenant shall extend to an entry by that person, be it by *droit* or *tort*, for it is to be presumed that such person had an interest (*r*).

3. And where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass (*s*). The contrary, however, was formerly holden (*t*). It must, nevertheless, be an act asserting a title; therefore, if the seller went on the estate to sport, the purchaser could not maintain covenant (*u*).

(*q*) T. 26 H. 8, pl. 11.

(*r*) Foster *v.* Mapes, Cro. Eliz. 212; Hob. 35; 1 Ro. Abr. 430, pl. 13. See Hayes *v.* Bickerstaff, Vaugh. 118; Nash *v.* Palmer, 5 Mau. & Selw. 374. Fowle *v.* Welsh, 1 Barn. & Cress. 29; 2 Dowl. & Ryl. 133.

(*s*) Lloyd *v.* Tomkies, 1 Term Rep. 671; Crosse *v.* Young, 2 Show. 425; S. C. MS.

(*t*) Davie *v.* Sacheverell, 1 Ro. Abr. 429, pl. 7.

(*u*) See Seddon *v.* Senate, 13 East, 72.

4. So a covenant against all claiming or *pretending to claim* any right extends to a tortious eviction (*v*).

5. And whatever opinion may anciently have been entertained (*x*), yet it is now clear, that a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally (*y*). It is, however, customary to expressly extend covenants for title to *equitable* charges, disturbances, &c.

6. In a case where the seller covenanted generally that he was seised in fee, without any condition, &c. or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber or determine the same, and had good right to convey the same; it appeared that the lady of the manor had actually demised a small part of the land sold for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was held that the lease was made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It was asked, what can a man be supposed to covenant against beyond the validity of the title? and most assuredly not against these surreptitious pocket leases. The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of Hayes *v.* Bickerstaff, that the law shall never judge that a man covenants against the wrongful acts of strangers (*z*).

It will be observed, that the leases were accompanied with actual possession by the lessees, who had expended

(*v*) Chaplain *v.* Southgate, 10 Mod. 384; Com. 230; Perry *v.* Edwards, 1 Str. 400.

(*x*) Selby *v.* Chute, Mo. 859; 1 Brownl. 23; Winch, 116; 1 Ro. Abr. 430, p. 15; and see 3 Leo. 71, pl. 109.

(*y*) Calthorp *v.* Hayton, 2 Mod. 54; Hunt *v.* Danvers, T. Raym. 370.

(*z*) Jerritt *v.* Weare, 3 Price, 575.

money on the property. They were therefore within the covenant, and unless the covenants were held to extend to them, general covenants for title would be waste paper.—They are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title. Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions by persons not claiming lawfully subsequently to the conveyance.

7. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken (*a*).

In respect to the persons against whose acts limited covenants will extend, it seems that,

1. A covenant for quiet enjoyment against *A* and any other person by his means, title or procurement, is broken by the entry of a person in whose name *A* purchased jointly with his own name (*b*).

2. In this case Mr. Justice Doddridge put many cases. If a tenant in tail to whom the estate-tail was made, makes an estate and covenants as before, and the issue ousts the covenantee, the covenant is broken, because, being his purchase, the descent to his issue is by his means, although not by his title. But if the issue make an estate and covenant, and the issue of the issue enter, it is not broken, because they are not in by his means, but

(*a*) Nash v. Ashton, Sir Tho. Jones, 195.

(*b*) Butler v. Swinnerton, Palm. 339; Cro. Jac. 657. Spencer v. Marriott, 1 Barn. & Cress. 457; 2 Dowl. & Ryl. 665, S. C.

by descent. But if there be a lessee for life, remainder over, and the lessee make an estate and covenant, and die, and he in remainder enter, it is not broken, because he is in by the feoffor, not by the lessee. But if a man enfeoff upon condition to be enfeoffed for life, remainder over, there it shall be otherwise, because by his procurement and means; *et sic de similibus.*

3. So if *A* covenant for quiet enjoyment against all claiming by, from or under him, a claim of dower by his wife is within the covenant; but otherwise, if the mother of *A* claim her dower, because she does not claim by, from or under him (*c*).

4. A covenant for quiet enjoyment against *A*, or any person claiming under him, extends to a person deriving title under an appointment made by *A*, by virtue of a power, in the creation of which he concurred, although the estate did not move from *A*, and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power.

This was settled in the case of Hurd *v.* Fletcher (*d*). Sir John Astley and his wife levied a fine of *her* estate to the use of Sir John for life, with power of leasing; remainders over, with a joint power of revocation to Sir John and Lady Astley. They exercised this power, and, subject to the husband's life-estate, and power of leasing and other uses, which afterwards determined, limited the estate to Lord Tankerville in tail. Sir John afterwards granted a lease not warranted by the power, and covenanted for quiet enjoyment by the lessee, without any interruption by him, or any person or persons claiming, or to claim by, from or under him. Lord Tankerville's remainder in tail having fallen into possession, he evicted the lessee on account of the defective execution of the

(*c*) Godb. 333; Palm. 340. Vaughan, 4 Barn. & Cress. 261;
(*d*) Dougl. 43; see Evans *v.* 6 Dowl. & Ryl. 349.

power, whereupon the lessee brought an action against Sir John's executors; and it was holden, that Sir John was a necessary party to the second declaration of uses; and, therefore, Lord Tankerville claimed under him, and the eviction was within the covenant.

5. It may be proper to mention, that the case of Butler *v.* Swinnerton, which (to borrow an expression of Lord Kenyon's) is the *magna charta* of the liberal construction of covenants for title, is also stated in Shep. Touch. 171, which goes on to state, "and so it is also, if *A* purchase land of *B*, to have and to hold to *A* for life, the remainder to *C* the son of *A* in tail, and after *A* doth make a lease of this land to *D* for years, and doth covenant for the quiet enjoying, as in the last case, and then he dieth; and then *C* doth oust the lessee; in this case this was held to be *no* breach of the covenant:" and for this position, Swan's case, M. 7 and 8 Eliz. is cited, and no reference is made to any other report of the case. Now this case, as it stands in Shep. Touch. (a book of acknowledged authority) is in direct opposition to the decision in Butler *v.* Swinnerton; but from other reports of Swan's case (*e*), it appears that there was no *actual* covenant in the lease, but merely a covenant in law on the words "*concessit et dimisit*," and therefore the Judges thought the action did not lie, because the covenant determined with the estate of the lessee.

6. A covenant for quiet enjoyment, quietly and clearly acquitted of and from all grants, &c. rents, rent-charges, &c. whatsoever, has been holden to extend to an annual quit-rent payable to the lord of the manor, *and incident to the tenure* of the lands sold, although there was no arrear of the rent due (*f*).

7. A covenant for quiet enjoyment against any inter-

(*e*) Mo. 74, pl. 204; Dy. 257, pl. 13; Bendl. 138, pl. 208; and And. 12, pl. 25.

(*f*) Hammond *v.* Hill, Com. 180.

ruption of, from or by the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c. in the premises, by, from, under or in trust for him or them, or by, through or with his or their acts, means, *default*, privity, consent or procurement, was adjudged to extend to an arrear of quit-rent due at the time of the conveyance, although it was not shown that the rent accrued due during the time the vendor held the estate. For the Court said, if it were in arrear in his life-time, it was a consequence of law, that it was by *his default*; that is, *by his default* in respect of the party with whom he covenants to leave the estate unincumbered (*g*).

In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the Court would apply as well to a mortgage, or any other incumbrance created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default.—The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions.

8. We should be careful to distinguish the foregoing case from that (*h*) where the lessor, *reciting that he was seised of an estate of freehold and inheritance in the estate,*

(*g*) Howes *v.* Brushfield, 3 East, 491. See and consider Lord Alvanley's judgment in Hesse *v.* Stevenson, 3 Bos. & Pull. 565.

(*h*) Lady Cavan *v.* Pulteney, 2 Ves. jun. 544. See Reg. Lib. B. 1799, fo. 816.

covenanted for quiet enjoyment against himself, his heirs, &c. or any other person or persons lawfully claiming by, from or under him, &c. or by or through his, their or any of their acts, means, *default* or procurement. The lessees were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that on eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was to the lessees immaterial.

9. In Woodhouse *v.* Jenkins (*i*), tenant for life and his eldest son remainder-man in tail, demised to *A* for 99 years, he being aware of their title, and they covenanted with him for quiet enjoyment against themselves, their heirs and assigns, and all persons claiming under them. *A* granted an under-lease of the estate to *B*, and covenanted for quiet enjoyment against himself, his heirs, executors, administrators and assigns, "or of or by any other person or persons whomsoever lawfully claiming or to claim by, from or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity or procurement." The tenants for life and in tail both died, the latter without issue, and *B* was evicted by the next remainder-man; it was held that *A* was not liable on his covenant, for the eviction was by a title paramount, which he could not have defeated. The Court observed, that if the eviction could be brought

(*i*) 9 Bing. 431; 2 Moo. & Scott, 599, S. C.

within the terms of the covenant, it must fall within that part of it which provides against any persons claiming "by the acts, means, consent, neglect, default, privity or procurement of *A*, &c." It was not an eviction arising from the acts, means, or procurement of the lessor. After referring to the case of Butler and Swinnerton, the Court said, that in the present case, no act was done by the lessor, no consent was given to the eviction, there was no privity, no procurement; and consequently the only words of the covenant, if any, upon which a breach could be assigned, would be the remaining words, "neglect or default." Now it must be admitted that the eviction would have been prevented if *A*, at the time he took the leases for 99 years, had required the lessors to join in common recoveries to cut off the entails, and if the lessors had complied with such requisition. The question is, therefore, whether the not procuring such common recoveries to be suffered was a "neglect or default" in *A*, within the meaning of the covenant. And the Court were of opinion that no breach of covenant could be assigned on those words, unless it could be averred in the declaration that *A*, at the time the leases were made to him, had the power or means of procuring such common recoveries to be suffered by his lessors, the tenants for life and in tail, and that he neglected or omitted so to do. With such an allegation made and proved, an action of covenant might possibly be maintainable, but not without it. For if *A* had no means of compelling common recoveries to be suffered by the lessors, if upon his requisition they refused, it could hardly be said that he was guilty of any neglect or default in not procuring that step to be taken which he was unable to compel. It might indeed show a want of discretion in *A*, that he took leases under such a defeasible title; but a neglect and a default seemed to

imply something more than the mere want of discretion with respect to his own interests; something like the breach of a duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do, and the not preventing or avoiding some danger to the title, which he might have prevented or avoided.

II. We are now to consider in what cases restrictive words added to some of the covenants only, shall extend to all the covenants in the deed.

It may be first necessary to premise, that where covenants are limited to particular acts, as to the acts of the vendor for instance, the covenants are restrained in the following manner: "that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said *A*, the vendor, made, done, committed or executed, or knowingly or willingly suffered to the contrary thereof," he is seised in fee. And that, "for and notwithstanding any such act, deed, matter or thing whatsoever, as aforesaid," he has power to convey. And that the purchaser, his heirs and assigns, shall quietly enjoy "without the interruption, &c. of *A* or his heirs, or any person claiming by, from or under, or in trust for him or them." "And *that*" (I) free from incumbrances made or suffered "by *A*, or any person claiming by, from or under, or in trust for him." And lastly, that "*A*, and all persons

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(I) This pronoun is used emphatically. You shall enjoy the estate, and *that* free from incumbrances. Dr. Johnson has extracted a passage from the Duty of Man, in which the word is used in the same sense: "We must direct our prayers to right ends; and *that* either in respect of the prayer itself, or the things we pray for." It has, however, been thought that the word has crept into the common form of covenants through inadvertence.

claiming any estate in the premises by, from or under, or in trust for him," shall execute further assurances. But although this is the usual and technical manner of restraining covenants, yet an *agreement*, in any part of a deed, that the covenants shall be restrained to the acts of particular persons, will be good, notwithstanding that the covenants themselves are general and unlimited (*j*.)

2. General covenants will not, however, be cut down, unless the intention of the parties clearly appears.

Therefore, in the case of Cooke *v.* Fowndes (*k*), where the vendor covenanted that he was seised of a good estate in fee, *according to the indenture made to him by B* (of whom he purchased), it was determined to be a general covenant; for the reference to the conveyance by *B* served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title.

In a modern case, where, in an assignment of a lease by executors, they had covenanted for quiet enjoyment without any let, &c. of them, or either of them, their or either of their executors, administrators or assigns, *or any other person or persons whomsoever*, it was insisted at the bar that executors can only be understood to covenant against their own acts; and therefore, that the word "any other person or persons whomsoever," must be restrained to persons claiming under them. And it is, perhaps, not too much to say, that the opinion of the Court inclined to this construction (*l*). Wherever, therefore, executors or trustees agree to enter into covenants extending beyond their own acts, the agreement of the parties should be distinctly stated in the recitals.

3. In a case (*m*) where *A* and *B* were joint-tenants for

(*j*) Brown *v.* Brown, 1 Lev. 57.
(*k*) 1 Lev. 40; 1 Keb. 95.
(*l*) Noble *v.* King, 1 H. Black. 34.
(*m*) Proctor *v.* Johnson, Yelv. 175; Cro. Eliz. 809; Cro. Jac. 233.

years of a mill, *A* assigned all his interest to *C*, without the assent of *B*, and died. *B* afterwards, by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to *J S*, and covenanted for quiet enjoyment of it notwithstanding any act done by him. *B* also gave the purchaser a bond conditional to perform the covenants, *grants*, articles and agreements in the assignment; and the purchaser having been evicted by *C* of the moiety assigned to him, brought an action on the bond, and obtained judgment. Lord Eldon (*n*) seemed to consider the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the ground of the decision appears to be, that the word *grant* in the assignment amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was defective from the first as to a moiety, and the condition of the bond was to perform all grants, &c.

It seems material to refer the case of Johnson *v.* Proctor to the true ground of the decision, because if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title—a proposition which certainly cannot be supported.

4. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

Thus, in Nervin *v.* Munns (*o*), the vendor covenanted,

(*n*) See 2 Bos. & Pull. 25; and see Seddon *v.* Senate, 13 East, 63; Barton *v.* Fitzgerald, 15 East, 530.

(*o*) 3 Lev. 46.

1st, that notwithstanding any act by him to the contrary, he was seised in fee: 2dly, that he had good right to convey: 3dly, that the lands were clear of all incumbrances made by him, his father, or grandfather: and 4thly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather. And it was holden by three Justices against North, Chief Justice, that the second covenant, although general, was restrained by the first covenant to acts done by the vendor.

So in Browning *v.* Wright (*p*), where a vendor who claimed an estate in fee by purchase, sold the estate, and covenanted first, that notwithstanding any thing by him done to the contrary, he was seised in fee, " and that he had good right, &c. to convey in manner aforesaid," it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. For, in the first place, the purchaser was, according to the general practice, entitled to limited covenants only; and, in the next place, the special covenants would be of no use, if the other were general. Besides, the defendant having covenanted that, " for and notwithstanding any thing by him done to the contrary," he was seised in fee, *and that* he had good right to convey; the latter part of the covenant, coupled as it was with the former part by the words " and that," must necessarily be over-ridden by the introductory words " for and notwithstanding any thing by him done to the contrary (*q*)."

Again, where tenant *per auter vie* leased for twenty-one years, and covenanted that he had not done any *act, but* the lessee should or might enjoy it during the years; afterwards, within the twenty-one years, *cestui que vie*

(*p*) 2 Bos. & Pull. 13.
(*q*) *Per* Lord Alvanley, 3 Bos. & Pull. 574.

died; and it was adjudged that the covenant was not broken, for "but" referred the subsequent words to the preceding words (*r*).

So in Broughton *v.* Conway (*s*), a covenant that the vendor had not done any act to disturb the vendee, *but that* the assignee might enjoy without the disturbance of him *or any other person*, was held to be confined to acts done by the vendor, on the ground of the latter words being only a continuation of and dependent on the preceding matter. In this case, however, one of the Judges was decidedly of a contrary opinion; and certainly there were express words to get over, namely, "or any other person;" which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive, that no word was rendered inoperative, but the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will frequently influences the whole will. And in a recent case (*t*), where the covenants were introduced with the usual words, restricting them to the covenantor's own acts, but the covenants for quiet enjoyment ended thus: "of or by the said grantors or any of them, &c. *or of or by any other person or persons whatsoever:*" and the covenant against incumbrances was general, excepting only a chief-rent; the Court of King's Bench determined, that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited. Lord Ellenborough, C. J. in delivering the opinion of the Court, justly laid great stress on the covenant being a distinct covenant

(*r*) Peles *v.* Jervies, Dy. 240, marg.; Cro. Jac. 615, pl. 5.

(*s*) Dy. 240; Mo. 58; and see S. C. cited and applied by Lord Ellenborough, C. J. 8 East, 89; and 1 Brod. & Bing. 340; 3 Moo. 730.

(*t*) Howell *v.* Richards, 11 East, 633.

from the covenant for title. He said, that it was perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect, but he may at the same time know, that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any period to have been liable to some exception at the time of his conveyance.

In a later case (*u*), where the subject was elaborately discussed, the covenants in an assignment of a leasehold estate were, 1. that notwithstanding any act by the seller, the lease was a good lease; 2. "and further, that" the purchaser might peaceably enjoy without any interruption from "the seller, his executors, administrators or assigns, or any other person or persons whatsoever having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate," &c. in the premises; *and that* free from incumbrances by the seller; and moreover, for further assurance by the seller, his executors and administrators, and all persons claiming by, from, under or in trust for him or them. All the covenants therefore were restricted to the acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all man-

(*u*) Nind *v.* Marshall, 1 Brod. & Bing. 319; 3 Moo. 703; and see Foord *v.* Wilson, 8 Taunt. 543; 2 Moo. 592.

kind. It was held by three Judges against one, that by construction the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from Howell *v.* Richards, on the ground that there the covenant, respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him: this exception, therefore, confirmed the generality of all the other words.

Perhaps we should in this place notice the case of Barton *v.* Fitzgerald (*v*). It arose upon covenants in an assignment of a lease. The lease was recited to be for the term of ten years, and the seller assigned the estate to the purchaser for the residue of that term. The covenants were, first, the common covenant, that the seller had done no act to incumber, except an under-lease; 2dly, "and also," that the lease was subsisting, and not become void or voidable; 3dly, for quiet enjoyment against the act of the seller; and lastly, for further assurance of the seller during the residue of the term. It appeared that the lease was for ten years, if a person should so long live, and he died after the assignment, but before the expiration of the ten years, by effluxion of time. And the Court of King's Bench held, that the second covenant was general and unlimited, and that by the death of the *cestui que vie*, the purchaser had a good right of action. The Judges relied principally on the recital. The exception of the under-lease, which was for a term absolute, imported, they thought, that the seller had a right to incumber absolutely for the term stated, and they were of opinion, that all the other covenants would be operative, though the second were construed to be absolute. This

(*v*) 15 East, 530; see 3 Barn. & Adolph. 195.

case, it will be observed, depended upon very particular circumstances; independently of which it should seem, that the covenant upon which the purchaser recovered would have been restrained by the other covenants.

5. But where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent.

Thus in Gainsford *v.* Griffith (*x*), on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect and indefeasible lease in the law, and so should remain during the residue of the term, and that the purchaser, his executors, administrators and assigns, should quietly enjoy the premises without any let, denial, &c. by the vendor, his executors or assigns; and acquitted or otherwise saved harmless of all incumbrances committed by the vendor. And it was holden, that the generality of the preceding covenant was not restrained by the latter covenant.

And in Norman *v.* Foster, Lord C. J. Hale said,—If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second. And to this Wylde, J. agreed, and he said, that one covenant went to the *title*, and the other to the *possession* (*y*).

So in the late case of Hesse *v.* Stevenson (*z*), where, on an assignment of certain shares of a patent right, the assignor covenanted, that he had good right, &c. to convey the shares, and that he had not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same, it was decided that the

(*x*) 1 Saund. 58; 1 Sid. 328. See 2 Bos. & Pull, 23, 25; 1 Brod. & Bing. 331; 3 Moo. 723.

(*y*) 1 Mod. 101.

(*z*) 3 Bos. & Pull. 565.

generality of the first covenant was not restrained by the latter covenant. Lord Alvanley said, that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz. " for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

6. In Milner *v.* Horton (*a*), where the covenants in a conveyance were, 1. for a good title; 2. right to convey; 3. for quiet enjoyment, restricted to the sellers and persons claiming under them; 4. and that free from incumbrances by the sellers and persons claiming under them; the Court of Exchequer held, that it was the evident intention of the sellers to bind themselves by the two first covenants, that the vendees should have a good estate in fee simple, *so far as rested in them*, and therefore considered them qualified by the subsequent covenants. But in Smith *v.* Compton (*b*), that case was over-ruled. In the last case the deed was a common conveyance under a power, the creation of which was recited in the usual way. The covenants by the seller were, 1. that the power was in full force; 2. and that he had good right to appoint and convey; 3. and further for quiet enjoyment against the seller or any person or persons claiming or to claim by, from or under or in trust for him; 4. and that free from incumbrances made by the seller, or any other person or persons claiming or to claim

(*a*) M'Clel. 647. (*b*) 3 Barn. & Adolph. 189.

by, from, through, under or in trust for him; and 5. for further assurance by the seller, and all persons claiming or to claim by, from or under or in trust for him; and it was determined that the second covenant for right to convey was absolute and not qualified by the subsequent covenants. The Court said, that looking at all the cases which were cited for the defendants, there was only one, Milner *v.* Horton, where a general covenant had been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. It was said, that an absolute covenant for title was inconsistent with a qualified one for quiet enjoyment: the Court was not sure that that was so generally; but that at any rate was an instrument of a particular nature. It began by a statement of the specific power vested in the seller, for the disposal of the premises, which was followed by a covenant that the power had not been executed, and by other special covenants, which, in a deed so stating the vendor's title, might, not inconsistently, be introduced at the same time that the vendor covenants generally for right and power to convey. With one exception, there was no case where a general covenant had been held to be qualified by others, unless in some way connected with them. The Court had considered Milner *v.* Horton again since the argument, and they could not feel themselves bound by its authority: they came therefore to this conclusion, that the covenant declared upon, being unqualified in itself, and unconnected with any words in the qualified covenants, must, in a court of law, be regarded as an absolute covenant for title.

7. And in cases of this nature, as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preced-

ing general covenant will not enlarge a subsequent limited covenant.

Thus, in Trenchard *v.* Hoskins (*c*), a person being seised of an estate granted under letters patent, conveyed it to a purchaser, and in the conveyance the grant from the Crown was recited, and the title was deduced from the grantee to the vendor, who entered into covenants, first, that he was seised in fee; secondly, that he had good power to convey; and thirdly, that there was no reversion in the Crown, *notwithstanding any act done by him.* In grants of lands by the Crown, it is usual to reserve a reversion which the grantee cannot bar. After great difference of opinion on the subject, it seems to have been decided, that the restrictive words to the last covenant did not extend to the two preceding ones; the Court presuming the intention to be, that the vendor should enter into an absolute covenant for his seisin in fee, in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the Crown by his own act (*d*).

8. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land (*e*).

Thus, where *A* covenanted that he was seised in fee notwithstanding any act done by him, and that the lands were of a certain annual value; the latter was holden to be an absolute covenant, that the lands were of the stated value (*f*).

(*c*) Winch, 91; 1 Sid. 328. See 2 Bos. & Pull, 19.

(*d*) See 2 Bos. & Pull. 25, *per* Lord Eldon.

(*e*) See 3 Lev. 47.

(*f*) Hughes *v.* Bennett, Cro. Car. 495; 1 Jones, 103, S. C.

So in another case (*g*), where a man covenanted that he was seised in fee, notwithstanding any act done by him or any of his ancestors; and that no reversion was in the king or any other; and that the estate was of a certain annual value; and that the plaintiff and his heirs should enjoy the estate discharged from all incumbrances made by him or any of his ancestors, it was decided, that the covenant as to value was an absolute and distinct covenant, and had no dependance upon the first part of the covenant.

9. In the case of Rich *v.* Rich (*h*), a covenant "that lands were of the value of 1,000*l. per annum*, and so should continue, notwithstanding any act done or to be done by the covenantor," was holden to be only a covenant that the covenantor had not lessened the value.

10. This subject must not be closed without observing, that if general covenants are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants, as they originally stood (*i*).

III. 1. It still remains to say a few words concerning a purchaser's remedy under covenants for the title; and first, if he be evicted, and the eviction is within the covenant, he may bring an action at law for damages.

2. But, as we have already seen, unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the

(*g*) Crayford *v.* Crayford, Cro. Car. 106.

(*h*) Cro. Eliz. 43.

(*i*) Coldcott *v.* Hill, 1 Cha. Ca. 15; 1 Sid. 328, cited; Fielder *v.* Studly, Rep. *temp.* Finch, 90. See 2 Bos. & Pull. 26; 3 Bos. & Pull. 575; and *supra*, Vol. 1, p. 161.

purchase-money, in case of eviction, either at law or in equity (*k*).

3. If the title prove bad, a purchaser may have recourse to law for damages, or *if the defect can be supplied by the vendor*, he may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title, will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration (*l*). But after a conveyance executed, a bill cannot be filed for compensation.

4. It seems that, under a covenant for further assurance, a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the estate (*m*); but it may be doubted whether he can require a covenant to produce the title-deeds if the purchase was completed without such a covenant (*n*).

5. So if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery (*o*) (I).

6. But if the original contract was not fit to be executed by equity, the Court will not interfere in behalf of the purchaser, but leave him to his remedy at law (*p*). And if the title prove bad, and the purchase was made at

(*k*) *Supra*, Vol. 1, p. 554.

(*l*) Taylor *v.* Debar, 1 Cha. Ca. 274; 2 Cha. Ca. 212. See Seabourne *v.* Powell, 2 Vern. 11; and see ch. 16, s. 10, *infra*.

(*m*) Napper *v.* Lord Allington, 1 Eq. Ca. Abr. 166, pl. 4.

(*n*) Fain *v.* Ayers, 2 Sim. & Stu. 533. See Hallett *v.* Middleton, 1 Russ. 243.

(*o*) Pye *v.* Daubuz, 3 Bro. C.C. 595.

(*p*) Johnson *v.* Nott, 1 Vern. 271.

(I) See now 3 & 4 Will. 4, c. 74, s. 55 to 69.

a great undervalue, equity will relieve the vendor against an action on the covenants for title, allowing the purchaser his purchase-money, with interest only, he discounting the mesne profits (*q*).

7. An action for breach of a covenant for title (*r*) will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy.

8. An action of covenant did not lie against a devisee upon the statute of fraudulent devises (*s*). No such remedy lies at common law, and therefore, although a vendor died seised of real estates, yet if they were devised by his will, a purchaser would not have any remedy against them, notwithstanding that the covenants for title were broken, and there was no other fund to which he can resort for damages. This is now remedied by the 1 W. 4, c. 47, which (*t*) expressly extends the provisions of the former statute to the case of *covenants*.

Lastly, the purchaser is not bound to give notice of an adverse suit to the covenantor; but if he compromise it, may recover the whole sum paid and his costs between solicitor and client, if the claim was within the covenant. The only effect of want of notice in such a case as this is, to let in the party who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged, that he had made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given to him. But that must be proved (*u*).

(*q*) Zouch *v.* Swaine, 1 Vern. 320.

(*r*) Hammond *v.* Toulmin, 7 Term Rep. 612; Mills *v.* Auriol, 1 Hen. Blackst. 433.

(*s*) 3 W. & M. c. 124; Wilson *v.* Knubley, 7 East, 128.

(*t*) s. 3; see 3 & 4 W. 4, c. 104.

(*u*) Smith *v.* Compton, 3 Barn. & Ald. 407.

CHAPTER XIV.

OF THE PERSONS INCAPABLE OF PURCHASING.

UNDER this head we may consider, 1st, Who are incapable of purchasing absolutely for their own benefit by the general rules of law: and, 2dly, Who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

SECTION I.

Of Persons incapable of Purchasing by the general Rules of Law.

THIS incapacity is of three kinds: 1st, An absolute incapacity: 2dly, An incapacity to hold, although an ability to purchase: and, 3dly, An incapacity to purchase, except *sub modo.*

I. First then, With respect to persons who are altogether incapable of purchasing.

The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands (*a*) by those names.

But it seems that in London the parson and churchwardens are a corporation to purchase lands (*b*). And churchwardens and overseers are enabled, by statute

(*a*) Co. Litt. 3 a.

(*b*) Warner's case, Cro. Jac. 532; Hargrave's n. (1) to Co. Litt. 3 a.

law (*c*), to purchase a workhouse for the poor, but this is merely as trustees, and does not affect the general rule of law.

II. With respect to persons who are capable of purchasing, but incapable of holding: They are,

1st, Aliens: for although they may purchase, yet it can only be for the benefit of the king: and upon an office found, the king shall have it by his prerogative (*d*). And it seems that an alien cannot protect himself by taking the conveyance in the name of a trustee, for the mischief is the same as if he had purchased the lands himself (*e*).

But if an alien be made a denizen by the king's letters patent, he is then capable of holding lands (*f*) purchased after his denization.

And it seems, that if an alien purchase lands, and before office found the king make him a denizen by letters patent, and confirm his estate, the confirmation will be good; as the land is not in the king till office found (*g*).

2dly, Persons who have committed felony or treason, or have been guilty of the offence of *præmunire*, and afterwards purchase lands, and then are attainted; for they have ability to purchase, although not to hold; and for that reason the lord of the fee shall have the lands; but if they purchase after they are attainted, they are then in the same situation with aliens, and the lands must go to the king (*h*).

Lastly, Corporations sole or aggregate, either ecclesiastical or temporal, cannot hold lands without due license

(*c*) 9 Geo. 1, c. 7, s. 4.
(*d*) Co. Litt. 2 b.
(*e*) The King *v.* Holland. All. 14; Sty. 20, 40, 75, 84, 90, 94; 1 Ro. Abr. 194, pl. 8.
(*f*) Co. Litt. 2 b.
(*g*) Goulds. 29, pl. 4.
(*h*) Co. Litt. 2 b. See Rex *v.* Inhab. of Haddenham, 15 East, 463.

for that purpose (*k*): and the lord of the fee, or in default thereof within the time limited by the statutes, the king may enter (*l*).

III. With respect to persons capable of purchasing *sub modo:* They are,

1st, Infants under the age of twenty-one years, who may purchase, and at their full age may bind themselves by agreeing to the purchase; or may wave the purchase without alleging any cause for so doing: and if they do not agree to the purchase after their full age, their heirs may wave the purchase in the same manner as the infants themselves could have done (*m*).

2dly, *Femes covert*, who are capable of purchasing, but their husbands may disagree thereunto, and divest the whole estate, and maintain trover for the purchase-money (*n*). If a husband neither agree nor disagree, the purchase by his wife will be effectual; but after his death she may wave the purchase, without giving any reason for so doing, although her husband may have agreed to it. And if, after her husband's death, she do not agree to it, her heirs may wave it (*o*).

A *feme covert* may, however, purchase lands pursuant to an authority given by her husband, and he cannot avoid it afterwards (*p*).

3dly, Lunatics or idiots, who are capable of purchasing; but although they recover their senses, cannot themselves, it should seem, wave the purchase (*q*): and

(*k*) Co. Litt. 99 a.

(*l*) Co. Litt. 2 b.

(*m*) Ketsey's case, Cro. Jac. 320; 1 Ro. Abr. 731, (K.); Co. Litt. 2 b. See Holmes *v.* Blogg, 8 Taunt. 508; 2 Moo. 552.

(*n*) Garbrand *v.* Allen, 1 Lord Raym. 224. See Francis *v.* Wigzell, 1 Madd. 258.

(*o*) Co. Litt. 3 a; Barnfather *v.* Jordan, Dougl. 452, 2d edit.

(*p*) Garbrand *v.* Allen, *ubi sup.*

(*q*) On this point see 2 Blackst. Comm. 291, 7th edit.

if they recover and agree thereunto, their heirs cannot set it aside.

If they die during their lunacy or idiocy, then their heirs may avoid the purchase (*r*). And as the king has the custody of idiots, upon an office found he may annul the purchase (*s*): and after the lunatic is found so by inquisition, his committee may vacate the purchase (*t*).

Lastly, under this head we might formerly have ranked papists and persons professing the popish religion (*u*), who had neglected to take the oath prescribed by the 31 Geo. 3, c. 32 (*x*). For a papist took for the benefit of his protestant next of kin till his conformity; for the benefit of himself after his conformity; and for the benefit of his heir after his death—Nay, for the benefit of himself, during his life and non-conformity, by reason of the action which was given him; and might therefore be said to be capable of purchasing *sub modo* (*y*).

But by the 10 Geo. 4, c. 7, s. 23, it was enacted, that after the passing of that Act no oath or oaths should be tendered to or required to be taken by his Majesty's subjects professing the Roman-catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as might by law be tendered to and required to be taken by his Majesty's other subjects.

(*r*) Co. Litt. 2 b.

(*s*) Co. Litt. 247 a.

(*t*) Clerk by Committee *v.* Clerk, 2 Vern. 412; Addison by Committee *v.* Dawson, 2 Vern. 678; Ridler *v.* Ridler, 1 Eq. Ca. Abr. 279.

(*u*) See 11 & 12 W. 3, c. 4; Michaux *v.* Grove, 2 Atk. 210.

(*x*) See 43 Geo. 3, c. 30.

(*y*) See Mallom *v.* Bringloe, Willes, 75; Com. 570, S. C.

SECTION II.

Of Purchases by Trustees, Agents, &c.

We come now to persons who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

I. It may be laid down as a general proposition, that trustees (*z*), (unless they are nominally such, as trustees to preserve contingent remainders (*a*), agents (*b*), commissioners of bankrupts (*c*), assignees of bankrupts (*d*) (I),

(*z*) Fox *v.* Mackreth, 2 Bro. C. C. 400; 4 Bro. P. C. by Tomlins, 258; Hall *v.* Noyes, 3 Bro. C. C. 483; and see 3 Ves. jun. 748; Kellick *v.* Flexny, 4 Bro. C. C. 161; Whitcote *v.* Lawrence, 3 Ves. jun. 740; Campbell *v.* Walker, 5 Ves. jun. 678; and Whitackre *v.* Whitackre, Sel. Cha. Ca. 13.

(*a*) See Parks *v.* White, 11 Ves. jun. 226.

(*b*) York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. 42; Lowther *v.* Lowther, 13 Ves. jun. 95. See Watt *v.* Grove, 2 Scho. & Lef. 492; Whitcomb *v.* Minchin, 5 Madd. 91; Woodhouse *v.* Meredith, 1 Jac. & Walk. 204.

(*c*) *Ex parte* Bennet, 10 Ves. jun. 381; *ex parte* Dumbell, Aug. 13, 1806; Mont. notes, 33, cited; *ex parte* Harrison, 1 Buck, 17.

(*d*) *Ex parte* Reynolds, 5 Ves. jun. 707; *ex parte* Lacey, 6 Ves. jun. 625; *ex parte* Bage, 4 Madd. 459; *ex parte* Badcock, 1 Mont. & Mac. 231.

(I) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an assignee of a bankrupt; adding, that it must be understood, that, whenever assignees purchase, they must expect an inquiry into the circumstances. See 6 Ves. jun. 630, n. (b); and 8 Ves. jun. 346; 10 Ves. jun. 395. And an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be a sufficient cause of removal. *Ex parte* Reynolds, 5 Ves. jun. 707.

If an assignee purchase an estate sold under the commission, and upon an accidental increase in the value of the property, he afterwards sells it at a considerable advance, he cannot, upon discovering that he ought not to have been a purchaser, pay the difference of the sales to the general fund of the creditors. *Ex parte* Morgan, Feb. 24, 1806;

solicitors to the commission (*e*), auctioneers, creditors who have been consulted as to the mode of sale (*f*), or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property,) are incapable of purchasing such property themselves; except under the restrictions which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest* (I).

The able counsel for the appellants in York-Buildings Company *v.* Mackenzie (*g*), strongly observed, that the ground on which the disability or disqualification rests, is

(*e*) Owen *v.* Foulkes, 6 Ves. jun. 630, n. (*b.*); *ex parte* Linwood; *ex parte* Churchill, 8 Ves. jun. 343, cited; *ex parte* Bennet, 10 Ves. jun. 381; *ex parte* Dumbell, Aug. 13, 1806; Mont. notes, 33, cited. See 12 Ves. jun. 372; 3 Mer. 200.

(*f*) See *ex parte* Hughes, 6 Ves. jun. 617; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; Oliver *v.* Court, 8 Price, 127.

(*g*) 8 Bro. P. C. 63, where the authorities in the civil law are collected.

Mont. notes, 31. And where upon the sale of a bankrupt's estate by auction, in two lots, both of the lots were bought in by the assignee, without the consent of the creditors, the Lord Chancellor, although there was a profit on the resale of one lot, which was more than equal to the loss on the resale of the other, so that the balance was in favour of the estate, held the assignee liable to make good the loss on the lot which was resold at a less sum, without permitting him to set off the profit gained by the resale of the other lot. *Ex parte* Lewis, 1 Glyn. & Jame. 69. *Ex parte* Buxton, *ib.* 355.

(I) This principle has been attended to in the general inclosure act, which renders commissioners incapable of purchasing any estate in the parish in which the lands are intended to be inclosed, either in the names of themselves or others, until five years after the date and execution of the award, 41 Geo. 3, c. 109, s. 2.

no other than that principle which dictates, that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted.

A creditor having taken out execution may buy the estate sold under the execution (*h*). Indeed this was never doubted where the transaction was a fair one. And the rule has never been applied to a purchase by mortgagee from the mortgagor, and it is to be hoped that it never will. In Ireland, many leases granted by mortgagors to mortgagees were set aside by Lord Redesdale, on the ground that the transaction was usurious, although that learned Judge's successors have not been inclined to carry the principle as far as he did. In one case (*i*) it was objected that the decision might tend to impeach dealings between mortgagor and mortgagee for a sale of the equity of redemption. But Lord Redesdale said, that to this a good answer was given at the bar. The cases are totally different; the parties stand in a different relation: if there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase-money to pay off the mortgage. It can therefore only be for want of a better purchaser, that the mortgagor can be compelled to sell to the mortgagee: *but Courts view transactions even of that sort between mortgagor and mortgagee, with considerable*

(*h*) Stratford *v.* Twynam, 1 Jac. 418.

(*i*) Webb *v.* Rorke, 2 Scho. & Lef. 673; and see 1 Ball & Beatty, 164; *ex parte* Marsh, 1 Madd. 148; see Chambers *v.* Waters, 3 Sim. 42.

jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.

Perhaps the observation, that "Courts view transactions even of that sort between mortgagor and mortgagee, with considerable jealousy," puts the doctrine higher than one should wish to see it stand. A sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud: the mere circumstance that the mortgagee purchased for less than another would have given, would not of itself be a sufficient ground to impeach a sale; and Lord Redesdale, in stating that as an ingredient, adds also circumstances of misconduct in obtaining the purchase. Where a mortgagee sells under the general order in bankruptcy, it is usual to apply for leave for him to bid at the sale, where he intends to do so. But there he may fairly be considered as the seller, and he cannot, without the leave of the Court, sustain the two characters of seller and buyer (*k*). But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing (*l*).

The principle has, however, been extended to a purchase by an attorney from his client, while the relation subsists (*m*).

So a person chosen as an arbitrator, cannot buy up

(*k*) *Ex parte* Du Cane, 1 Buck, 18. See *ex parte* Marsh, 1 Madd. 148.

(*l*) Downes *v.* Glazebrook, 3 Mer. 200.

(*m*) See Bellew *v.* Russell, 1 Ball & Beatty, 96; 9 Ves. jun. 296; 13 Ves. jun. 138, as to *gifts*, which cite the early cases. And see Lord Selsey *v.* Rhoades, 2 Sim. & Stu. 41; Williams *v.* Llewellyn, 2 You. & Jer. 68; Champion *v.* Rigby, 1 Russ. & Myl. 539.

the unascertained claims of any of the parties to the reference: it would corrupt the fountain, and contaminate the award (*n*).

Where a person cannot purchase the estate himself, he cannot buy it as agent for another (*o*), and perhaps cannot even employ a third person to contract or bid for the estate on the behalf of a stranger (*p*).

This general rule stands much more upon general principle, than upon the particular circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases (*q*).

The necessity of such a general rule is evinced by an instance mentioned by Lord Eldon, of a solicitor under a commission, who finding he could make a bargain to sell the estate for 1,400*l.* kept that in his own breast, and made a bargain with the assignees for the purchase of it at 350*l.* (*r*)

In Davidson *v.* Gardner (*s*), Lord Hardwicke laid down the following rules as to a trustee purchasing of his *cestui que trust.* 1st, That in all cases of a trustee purchasing of the *cestui que trust,* the Court will look upon it with a jealous eye. 2dly, It has been laid down as a general rule, that where a trustee for persons not *sui juris,* as infants and *femes covert,* becomes both buyer and seller, the Court will under no circumstances whatever, be they never so

(*n*) Blennerhasset *v.* Day, 2 Ball & Beatty, 116; Cane *v.* Lord Allen, 2 Dow, 289.

(*o*) See 9 Ves. jun. 248; *ex parte* Bennet, 10 Ves. jun. 381.

(*p*) See *ex parte* Bennet, *ubi sup. sed qu.*

(*q*) See 8 Ves. jun. 345, *per* Lord Eldon.

(*r*) See 8 Ves. jun. 340.

(*s*) Chancery, 21st July 1743, MS. See Prestage *v.* Langford, *infra*; Lambert *v.* Bainton, 1 Cha. Ca. 199.

fair between the parties (as consulting the friends of the infant, or of their refusing to purchase, or the like), establish a purchase of that kind, unless the transaction is legitimated by the act of the Court, or some public act. And the reason is, because if such purchases were allowed, they would be liable to very great abuses; and this is the reason why the Court will not allow a trustee any thing for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the Court decreed it to be in trust for the infant, though not the least unfairness appeared; which was the case of Rumford Market, before Lord King (*t*). But if a bill is brought, and a sale ordered, and notice of the sale before the Master, and the trustee purchases, the Court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of Saunders *v.* Burroughs, before the present Master of the Rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into execution. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was *sui juris*, where no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant who had purchased being a trustee for the plaintiff, who was a *feme covert*, and had the estate to her separate use, and therefore in a court of equity considered as a *feme sole*, and *sui juris*, as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the de-

(*t*) Keech *v.* Sandford, Sel. Cha. Ca. 61. See Lesley's case, 2 Freem. 52.

fendant; it appearing that she had received a full value, and no particular instances of fraud being proved.

From this case it appears that, in the time of Lord Hardwicke, a purchase by a trustee, even for infants, was deemed good, if the estate was sold by public auction, or before a Master; but a purchase by a trustee, whether for adults or infants, cannot now be supported, although the estate be sold by public auction (*u*), or before a Master, under a decree for sale (*x*). Nor, indeed, ought the publicness of the sale to sustain a purchase, which cannot otherwise be supported. For the trustee may know not only the surface value, but that there are minerals, in which case he would buy upon the rent, and gain all that advantage (*y*). So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced if full information was given (*z*).

But under particular circumstances, a purchase by a trustee or agent, before the Master, may be confirmed, although with great reluctance.

Thus, in Wren *v.* Kirton (*a*), the facts were these: Upon a former sale before the Master, the sum of 23,000 *l.* was bid by a person bidding *bonâ fide*. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions no more was offered than 12,000 *l.* and 6,000 *l.* At the last sale one Wilson was declared the purchaser at the sum of

(*u*) York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. 42; Whichcote *v.* Lawrence, 3 Ves. jun. 740; Campbell *v.* Walker, 5 Ves. jun. 678; Sanderson *v.* Walker, 13 Ves. jun. 601, S. C.; and *ex parte* James, 8 Ves. jun. 337; and see 10 Ves. jun. 393; Attorney-General *v.* Lord Dudley, Coop. 146.

(*x*) Price *v.* Byrn, 5 Ves. jun. 681, cited. See Cary *v.* Cary, 2 Scho. & Lef. 173.

(*y*) See 10 Ves. jun. 394.

(*z*) See 8 Ves. jun. 349.

(*a*) See 8 Ves. jun. 502.

15,000*l.* He purchased as trustee for Wade, the agent and manager of the colliery.

The Lord Chancellor said, if this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him, even at some risk, to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had to those who were to sell. The difficulty that pressed him was, the consequence, the danger of further loss by resale. He would (he added) not hesitate to open the sale if the least advance upon 15,000*l.* was offered; but without such an offer there was nothing leading him to suppose it would ever again reach the sum that was originally bid.—The Master's report of the best bidder was, with considerable reluctance, confirmed; unless, on or before the first seal, an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000*l.* No security was however offered, and the agent completed the purchase.

In Oldin *v.* Samborne (*b*), Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside. But it seems clear, that such a purchase would now be set aside on general principles, without reference to the adequacy of the consideration (*c*).

It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent or other person having a confidential cha-

(*b*) 2 Atk. 15.

(*c*) See Dawson *v.* Massey, 1 Ball & Beatty, 219.

racter, cannot even be opposed as a bar to the *aid* of the Court *in favour of the purchaser.*

Thus, in Prestage *v.* Langford (*d*), the auctioneer's son, who was in partnership with his father, and another person, bought an estate sold by order of a trustee for infant legatees, and contracted to sell it a few days afterwards for 750 *l.* more than they gave for it. But the proof of fraud being judged defective, the Court would not set aside the sale merely because one of the auctioneers was buyer and seller too, but decreed a specific performance, nevertheless, without costs; *in order* (as was said) *to discourage all such suspicious transactions.*

So, in the late case of Coles *v.* Trecothick (*e*), the trustee's father (for whom the trustee in this instance acted as agent), purchased an estate (which had been previously put up to sale by auction, and bought in) of the *cestui que trust* for 20,000 *l.*; and as the *cestui que trust* had full knowledge of the value, &c. and he himself, and not the trustee, fixed the price, and consented to the sale, and no fraud was proved, a performance *in specie* was decreed; although the *cestui que trust* had since the contract been offered 5,000 *l.* more for the estate.

It must, however, be observed, that the case of Prestage *v.* Langford was decided before the broad rule which now prevails was laid down. Indeed that case is clearly overruled by later decisions, as the purchaser was in fact employed in the sale. And the decision in the case of Coles *v.* Trecothick does not seem to meet with the approbation of the Profession. But if, under the particular circumstances of this case, the Court had not compelled execution of the contract, it would certainly have been deciding, that neither a trustee himself, nor any one connected with him, or related to him, can buy of the *cestui*

(*d*) 3 Wood. 248, n. Chan. M. 11 Geo. 3.

(*e*) 9 Ves. jun. 234; 1 Smith, 233.

que trust, however fair and open the circumstances may be. Indeed, Lord Eldon seems to have founded his decision on the ground, that the trustee himself might have purchased the estate.

It may here be remarked, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, it is in practice considered, that the estate may be safely purchased by the tenant for life himself. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think that it cannot be impeached on general principles (*f*). A few years ago, considerable doubt was entertained by the Profession, whether the power of sale and exchange, usually inserted in settlements of estates, authorized a sale or exchange to or with the tenant for life, or at least whether equity would not relieve against the transaction, and that doubt was stated as a ground for requiring the aid of Parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life; which it was conceived could not be done under a power of sale and exchange in the settlement. The Chief Baron, and Mr. Baron Hotham, to whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore the bill was unnecessary, *and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind:* and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange.

(*f*) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but see *ib.* 476, 477.

Since these observations were written, the point has again been agitated in practice. It is a point which no private opinion can put at rest, although, after the opinions of the Chief Baron and Mr. Baron Hotham, sanctioned by the House of Lords, and followed up in practice, there seems to be no ground to fear that a different rule will be established. The point has been decided by the Lord Chancellor since the above observations were written, in favour of the execution of the power (*g*), and the point, therefore, is now at rest.

II. The purposes for which estates are vested in trustees for sale, are generally either for the benefit of creditors; of individuals *sui juris*; or persons not *sui juris*; and we are now to consider in what manner trustees may become purchasers of estates vested in them for those several purposes, without being liable to be called to account for so doing.

Of purchases by trustees or other prohibited persons in general, it must previously be remarked, that the Court will not permit them to give up their office, and to bid, as it would lead to infinite mischief. The *cestuis que trust* themselves, as we shall see, can decide this; and no Court can say *ab ante* they will permit it: for circumstances may exist at the time of the second sale that the Court cannot know (*h*).

1. With respect to a trustee for creditors purchasing the estate himself.

In Whelpdale *v.* Cookson (*i*), where a trustee for creditors purchased part of the estate himself, Lord Hardwicke said, if the *majority* of the creditors agreed to allow it, he should not be afraid of making the precedent.

But in a late case (*k*), Lord Eldon said, he doubted the

(*g*) Howard *v.* Ducane, 1 Turn. 81; see Grover *v.* Hugell, 3 Russ. 428.

(*h*) *Ex parte* James, 8 Ves. jun. 352.

(*i*) 1 Ves. 9; 5 Ves. jun. 682, n.

(*k*) See 6 Ves. jun. 628. See *ex parte* Bage, 4 Madd. 459.

authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arose from the difficulty of the *cestui que trust* duly informing himself what is most or least for his advantage, he had considerable doubt whether the majority could in that article bind the minority.

It seems doubtful, therefore, whether the purchase can be supported unless *all* the creditors consent, although convenience, and the general rule of transactions by a body of persons, are strongly in favour of Lord Hardwicke's opinion.

2. With respect to a trustee for a person *sui juris* becoming the purchaser of the estate.

If a trustee even for a person *sui juris* purchase in the name of another person, the sale will be set aside, as that very circumstance carries fraud on the face of it (*l*).

But it must not be understood that a trustee cannot buy from his *cestui que trust*; the rule is, that he cannot buy from himself (*m*). If, therefore, the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, there is no rule which says that he may not purchase of him, although the Court will look with a very jealous eye on a transaction of that nature (*n*): and to be supported, it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given, after full information, and bargained for the right to purchase (*o*).

So an attorney is not *incapable* of contracting with his client, but the relation must be in some way dissolved, or,

(*l*) Lord Hardwicke *v.* Vernon, 4 Ves. jun. 411; 14 Ves. jun. 504; and see 2 Bro. C. C. 410, n.

(*m*) 10 Ves. jun. 246; and see Ayliffe *v.* Murray, 2 Atk. 58; Crowe *v.* Ballard, 3 Bro. C. C. 117; 1 Ves. jun. 215.

(*n*) See 6 Ves. jun. 627.

(*o*) See 8 Ves. jun. 353.

if not, the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor; and you must examine whether all the duties of those characters have been performed. If an attorney deal with his client, he should require him to get another attorney to advise with him as to the value, or, if he will not, then out of that state of circumstances, this clear duty results from the rule of equity, and throws upon him the whole *onus* of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he had given his client all that reasonable advice against himself that he would have given him against a third person (*p*). So if an attorney be employed as agent in the management of a landed estate, he cannot deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent, and unless he do this, the contract, if questioned, cannot be supported (*q*).

And the same circumstances that will authorize a trustee to contract for himself will enable him to purchase as the agent of another (*r*).

3. With respect to a trustee for a person not *sui juris* buying the estate himself.

The only mode by which this can be effected, so as to protect the purchaser, is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to the Court by motion to let him be the purchaser. This is the only way he can protect him-

(*p*) Gibson *v.* Jeyes, 6 Ves. jun. 266; see p. 277, 278, *per* Lord Eldon, C.; Wood *v.* Downes, 18 Ves. jun. 120; Montesquieu *v.* Sandys, *ibid.* 302.

(*q*) Cane *v.* Lord Allen, 2 Dow, 289, *per* Lord Eldon, C.

(*r*) See 9 Ves. jun. 248.

self; and Lord Alvanley said there are cases in which the Court would permit it; as if only 500 *l.* was offered, and the trustee will give 1,000 *l.* (*s*).

III. It remains to consider what remedy the *cestui que trust* has, where his trustee has purchased the trust-estate in a manner not authorized by the rules of the Court. It may be premised, that this remedy goes precisely to the same persons who were entitled to the estate before the sale. Therefore, a man having a legal or equitable mortgage on the estate, which was not satisfied by the money produced by the sale, may pursue the remedy afforded by equity against the trustee. And the circumstance of the mortgagee having been present at the sale, where he bid for the estate, is no objection to his claim against the owner of the estate, where he (the owner) has himself set aside the sale and derived any advantage from it (*t*).

If the trustee has not sold the estate, the *cestui que trust* may insist on the purchase being avoided, and may reclaim his estate (*u*); for it need not be shown that the trustee has made an advantage (*v*).

If the *cestui que trust* require a re-conveyance of the estate, he must repay to the trustee the original price of the estate, and also all sums laid out for permanent benefit and improvement of the estate, and interest thereon from the times they were actually disbursed; and, on the other hand, the trustee must pay and allow all the rents received by him, and the yearly value of such parts as have

(*s*) Campbell *v.* Walker, 5 Ves. jun. 678; 13 Ves. jun. 601; see 1 Ball & Beatty, 418.

(*t*) *Ex parte* Lacey, 6 Ves. jun. 625; 12 Ves. jun. 8; *ex parte* Morgan, 12 Ves. jun. 6.

(*u*) See 6 Ves. jun. 627; York B. C. *v.* Mackenzie, 8 Bro. P. C. 42; Lord Hardwicke *v.* Vernon, 4 Ves. jun. 411; Randall *v.* Errington, 10 Ves. jun. 423.

(*x*) See 8 Ves. jun. 348; 10 Ves. jun. 385, 393.

been in his own occupation, and all sums received by the sale of timber or other parts of the inheritance, and interest thereon, from the times of their being received. This was decided in the great case of York-Buildings Company *v.* Mackenzie, in the House of Lords (*y*); and it appears that the House allowed him the value of improvements of all kinds, even in the instance of a mansion-house erected, and plantations of shrubs, &c. (*z*).

And where the *cestui que trust* is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee: and that if any one bid more, the trustee shall not have the estate: but if not, that he may be compelled to keep it (*a*).

If, however, the *cestui que trust* be desirous to have the estate put up in lots, and it was bought by the trustee in one lot, he must either repay the trustee the purchase-money with such interest as he would have been liable to pay upon his bargain, he accounting for the rents received, or paying an occupation-rent for the estate, if he personally occupied it: or the *cestui que trust* must consent to have the estate put up in one lot on the terms before mentioned (*b*).

The trustee will, in case of a resale, be allowed any money *bonâ fide* laid out, not only in substantial repairs and improvements, but also in such as have a tendency to bring the estate to a better sale; which will be added to the amount of the purchase-money, and the estate will be put up at the aggregate sum; deducting, how-

(*y*) 8 Bro. P. C. 42.

(*z*) See 6 Ves. jun. 624. This must have been decided in some of the subsequent appeals; see 8 Bro. P. C. 71, note.

(*a*) *Ex parte* Reynolds, 5 Ves. jun. 707; *ex parte* Hughes, *ex parte* Lacey, and Lister *v.* Lister, 6 Ves. jun. 617, 625, 631.

(*b*) *Ex parte* James, 8 Ves. jun. 337.

ever, an allowance for acts that deteriorate the value of the estate (*c*).

If any old buildings have been pulled down by the purchaser, and new ones erected, the old buildings, if incapable of repair, will be valued as old materials, but otherwise as buildings standing (*d*).

But no allowance will be made him for any loss he may sustain by a fall in the funds (*e*).

Formerly where a purchase by a trustee was set aside, the rule was, to put up the estate again to be sold to the best bidder; the trustee accounting for the profits, and being allowed his principal money and interest at 4 *per cent* (*f*).

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase-money (*g*).

Where a trustee buys the trust-estate at a fair price, the sale is seldom called in question, unless he afterwards sell it to advantage; and then the *cestui que trust* is of course only desirous that the money gained by the trustee on the resale should be paid to him.

Owing to this circumstance, a purchaser of a trust-estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear that a person purchasing with notice of the previous transaction would be liable to the same equity as the trustee was subject to. In the late case of Randall *v.* Errington (*h*), a purchaser from a trustee who had purchased in the name of a trustee was made a defendant, and the

(*c*) *Ex parte* Hughes, 6 Ves. jun. 617; *ex parte* Bennet, 10 Ves. jun. 381.

(*d*) 6 Madd. 2.

(*e*) *Ex parte* James, *ubi sup.*

(*f*) See Whelpdale *v.* Cookson, 1 Ves. 9; 5 Ves. jun. 682, n.

(*g*) Fox *v.* Mackreth, 2 Bro. C. C. 400; *ex parte* Reynolds, 5 Ves. jun. 707.

(*h*) 10 Ves. jun. 423.

prayer of the bill was, that if he purchased without notice, the trustee might account for the money gained by the resale; but as the equity against the purchaser was not noticed either by the counsel or the court, it must be presumed that no notice was proved. A different rule would, to use the expression of a great man, blow up like gunpowder this branch of equitable jurisdiction. It is indeed true, that in the case in the House of Lords, the proceedings in the Court of Sessions were reversed without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bonâ fide*, and before the dependence of the process (I). But this may be satisfactorily accounted for on two grounds: the one, that no notice was charged on the lessees, nor were the leases attempted to be impeached; the other, that the relief sought had been delayed for many years, and the point established by the House of Lords was, to say the least, a new doctrine with reference to Scotland. But this equity is now well established. No person, therefore, can be advised to become the purchaser of an estate so circumstanced, unless the *cestui que trust* will join; nor would a court of equity, on any other terms, enforce a specific performance of such a contract. But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name, from his *cestui que trust*, which may or may not be binding, according to circumstances, unless the purchaser have also notice that the sale was not such as could be supported in equity.

Before closing this chapter it must be remarked, that if a *cestui que trust* acquiesce for a long time in an improper purchase by his trustee, equity will not assist him to set

(I) And see the same rule as to to under-leases of a charity-estate, where the original lease is set aside as improvident. Attorney-General v. Griffith, 13 Ves. jun. 565; Attorney-General v. Backhouse, 17 Ves. jun. 283.

aside the sale (*i*). In Price *v.* Byrn (*k*), Lord Alvanley refused the aid of the Court, because the bill had been delayed twenty years (I).

But laches does not apply to a body of creditors, who may, therefore, claim the aid of equity at a much more distant period after the sale than an individual can (*l*).

And although acquiescence may have the same effect as original agreement, and may bar such a remedy as this, yet the question as to acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew his trustee had become the purchaser: for, while the *cestui que trust* continued ignorant of that fact, there is no laches in not quarrelling with the sale upon that special ground (*m*).

A purchase by a trustee from his *cestui que trust* is merely *malum prohibitum*, and not *malum in se*. It is one of those contracts which admit of confirmation by the injured party. But to give effect to a confirmation in a case like this, the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction (*n*).

(*i*) See *ex parte* James, 8 Ves. jun. 337; Hall *v.* Noyes, 3 Ves. jun. 748, cited; and see 11 Ves. jun. 226; Morse *v.* Royal, 12 Ves. jun. 355; Medlicott *v.* O'Donel, 1 Ball & Beatty, 156; Champion *v.* Rigby, 1 Russ. & Myl. 539.

(*k*) 5 Ves. jun. 681, cited; and see Norris *v.* Neve, 3 Atk. 26; Gregory *v.* Gregory, Coop. 201.

(*l*) Whichcote *v.* Lawrence, 3 Ves. jun. 740; and a case before the Court of Exchequer, 6 Ves. jun. 632, cited; York-Buildings Company *v.* Mackenzie, 8 Bro. P. C. by Tomlins, 42.

(*m*) *Per* Sir William Grant, 10 Ves. jun. 427; and see 2 Ball & Beatty, 129.

(*n*) Morse *v.* Royal, 12 Ves. jun. 355; Murray *v.* Palmer, 2 Scho. & Lef. 474; Roche *v.* O'Brien, 1 Ball & Beatty, 330; Wood *v.* Downes, 18 Ves jun. 120; Dunbar *v.* Tredennick, 2 Ball & Beatty, 304. *Vide supra*, Vol. 1, p. 265; Cockerell *v.* Cholmeley, 1 Russ. & Myl. 418; Small *v.* Attwood, 1 Yo. Rep. 407.

(I) See now 3 & 4 Will. 4, c. 27, s. 24, 25, 26, 27.

CHAPTER XV.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST-MONEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.

SECTION I.

Of Joint Purchases.

WHERE two or more persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other (*a*) (I), but where the proportions of the

(*a*) See Moyse *v.* Gyles, 2 Vern. 385; York *v.* Eaton, 2 Freem. 23; Thicknesse *v.* Vernon, 2 Freem. 84; Anon. Carth. 15; and see 3 Atk. 735; 2 Ves. 258; Rea *v.* Williams, MS. Appendix, No. 23; Aveling *v.* Knipe, 19 Ves. jun. 441.

(I) This distinction has not been thought satisfactory. A writer, to whom the Profession is under great obligation, observes, that if the advance of consideration, generally, will not prevent the legal right, the mere inequality of proportion, which may naturally be attributed to the relative value of the lives, cannot have that effect. See 9 Ves. jun. 597, n. (b). The distinction, however, seems founded on rational grounds. Where the parties advance the money equally, it may be fairly presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed; the inequality of proportion can scarcely be attributed to the relative

money are not equal, and this appears in the deed itself, this makes them in the nature of partners (*b*); and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (*c*).

And where the money is advanced in equal proportions, so that the purchasers are joint tenants in equity as well as at law, a conveyance by the purchasers to a trustee without any consideration, and without any express intent to sever the joint tenancy, will not have that effect; but the trust-estate will go to the survivor in the same manner as the legal estate would have done (*d*).

In all cases of a joint undertaking, or partnership, although the estate will survive at law, yet the survivor will in equity be a trustee for the representative of the deceased partner.

Thus, in a case (*e*) where five persons purchased lands in fee of the commissioners of sewers, and in order to improve and cultivate these lands afterwards entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a

(*b*) See 2 Ves. 258.

(*c*) *Per* Master of the Rolls, *in causa* Lake *v.* Gibson, 1 Eq. Ca. Abr. 290, pl. 3.

(*d*) Rea *v.* Williams, MS. Appendix, No. 21.

(*e*) Lake *v.* Gibson, *ubi sup.* and see Hayes *v.* Kingdome, 1 Vern. 33; Jeffereys *v.* Small 1 Vern. 217.

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value of the lives, because neither of the parties can be supposed not to know, that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint-tenancy by a clandestine act.

sum, to be laid out in the manurance and improvement of the land, it was held by the Master of the Rolls that they were tenants in common, and not joint tenants, as to the beneficial interest, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole. And the decree was affirmed by Lord Chancellor King (*f*).

So where two persons took a building-lease, and laid out money in erecting houses, they were held to be partners with respect to this property: and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased (*g*).

But as the lands will survive at law, equity, on the general rule that he who seeks equity shall do equity, will not relieve, unless the person seeking relief will do what he equitably ought to do.

Thus, in the first-mentioned case, the ancestor of the party seeking relief had quitted the concern for many years; since which time the other proprietors, to enable them to carry on their design, had purchased some other estates, which proved a losing concern; and the plaintiff was only relieved on contributing his share of the purchase-money of the estates so bought, with interest from the time the money ought to have been paid (*h*).

Lord Chancellor King said, that this was plainly a tenancy in common in equity, though otherwise at law; and the defendant Craddock having only a title in equity, that he must do equity; and that this was equitable in all

(*f*) Lake *v.* Craddock, 3 P. Wms. 158; S. C. MS.; Morris *v.* Barrett, 3 You. & Jerv. 384.

(*g*) Lyster *v.* Dolland, 1 Ves. jun. 431. See 2 Ves. jun. 631; and Elliot *v.* Brown, 9 Ves. jun. 597, cited.

(*h*) And see Senhouse *v.* Christian, 19 Ves. 157, cited.

its branches; for he had his election to drop all claim, or to take it on the same foot with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election (*i*).

If it be doubtful whether the purchasers bought the property to carry on trade, an inquiry will be directed before the Master to ascertain the fact (*j*) (I).

Where two or more persons agree for the purchase of an estate in moieties between them, subject to incumbrances, which are to be discharged out of the purchase-money, the purchase is in equity considered to be made for their equal benefit, *and on a mutual trust between them*; and therefore, although one of them may have abatements made to him by some of the incumbrancers, of sums due for interest or otherwise, in consideration of services and friendship, and it is expressly agreed to be to his own use, yet equity will compel him to account to the other for the benefit of these advantages (*k*).

So a new lease obtained by one partner shall enure to both (*l*), although he obtained it clandestinely and on his own account (*m*).

If two persons purchase an estate subject to a mortgage, and the mortgage-money is apportioned between them, and each of them covenants with the other to pay his share of the money, and to indemnify the other from it,

(*i*) MS. The judgment is not stated in any other printed book.

(*j*) See 1 Ves. jun. 435.

(*k*) Carter *v.* Horne, 1 Eq. Ca. Abr. 7, pl. 13.

(*l*) Burroughs *v.* Elton, 11 Ves. jun. 29.

(*m*) Featherstonhaugh *v.* Fenwick, 17 Ves. jun. 298.

(I) Whether the property as between the representatives shall be deemed real or personal, see Bell *v.* Phyn, 7 Ves. jun. 453; Bateman *v.* Shore, 9 Ves. jun. 500; Mackintosh *v.* Townsend, 1 Mont. Partn. notes, 97; Selkrig *v.* Davies, 2 Dow. 231.

they do not by those means make their personal estate, as between their real and personal representatives, the primary fund for payment of the mortgage-money (*n*).

It seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it to repay him their shares of the purchase-money, or to convey their shares of the estate to him: for by payment of all the money he gains neither a lien nor a mortgage, because there is no contract for either; nor can it be construed a resulting trust, as such a trust cannot arise at an after-period; and perhaps the only remedy he has, is to file a bill against them for a contribution (*o*). Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them the other shall be compelled to pay the whole, or greater part of the purchase-money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

But it has been held, that if one of two joint tenants of a lease renew, at his own expense, and the other party reap the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate, for a moiety of his advances on account of the fines, although such other moiety of the estate be in strict settlement at the time of the renewal. The case was considered to

(*n*) Forrester *v.* Lord Leigh, Ambl. 171. *Vide supra*, vol. 1, p. 188.

(*o*) See Wood *v.* Birch, and Wood *v.* Norman, Rolls, 7 and 8 March 1804; the decree in which case does not, however, authorize the observation, but the author conceives it to follow, from what fell from the Master of the Rolls at the hearing.

fall within the principle upon which mortgagees who renew leasehold interests have been decreed entitled to charge the amount upon the lands (*p*).

Where two or more persons purchase an estate, and the conveyance is taken in the name of one of them, the trust may be proved by letters written subsequently to the purchase; for the statute of frauds (*q*) does not require that a trust shall be created by a writing (*r*); but that it shall be *manifested and proved* by writing, which means that there should be evidence in writing, proving that there was such a trust (*s*).

But although two persons enter into a treaty for the purchase of an estate, and one of them desists, and permits the other to go on with the intended purchase, on his promising, by parol, to let him have the part of the estate he desired, yet it seems that this agreement cannot be enforced on account of the statute of frauds.

In Lamas *v.* Baily (*t*), which was a case of this nature, the plaintiff obtained a decree at the Rolls, it being insisted, that although it was an agreement parol, yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself, or at least have enhanced the price the defendant was to pay, so that the defendant had a benefit by it; and besides, it was a fraud (*u*), and like the case where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. But upon an appeal to the Lord Chancellor, the decree was

(*p*) Hamilton *v.* Denny, 1 Ball & Beatty, 199.

(*q*) 29 Car. 2, c. 3, s. 7.

(*r*) See n. (1) to the last edit. of Gilb. on Uses, p. 111.

(*s*) Forster *v.* Hale, 3 Ves. jun. 696; 5 Ves. jun. 308; Randall *v.* Morgan, 12 Ves. jun. 67.

(*t*) 2 Vern. 627; and see Riddle *v.* Emerson, 1 Vern. 106.

(*u*) See Thynn *v.* Thynn, 1 Vern. 296.

reversed, as being a parol agreement within the provision of the statute against frauds.

Mr. Powell (*x*) refers to an anonymous case in Viner (*y*), which he conceives to be another report of the case of Lamas *v.* Baily, where the Lord Chancellor dismissed the bill because there was no *absolute and positive* agreement; but the words were ambiguous and uncertain, and the statute intended to oust as well all such ambiguous agreements, as to prevent perjuries, &c., and this agreement would not bind, unless it were in writing. And Mr. Powell, therefore, conceives that the judgment turned on there being no *absolute* or *positive* agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

In the later case of Atkins *v.* Rowe (*z*), some persons desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and to a bill filed by the others to have the benefit of the lease, and that the purchaser might be decreed a trustee, he pleaded the statute of frauds in bar both to the discovery and relief. But the Lord Chancellor seemed of opinion, that the agreement, although by parol, was not within the statute, and ordered the plea to stand for an answer, with liberty to except, and the benefit of the plea to be saved to the hearing. Thus the case is reported in Moseley. It appears from the cases in the House of Lords (*a*), that the

(*x*) 1 Powell on Contracts, 310.

(*y*) 5 Vin. Abr. 521, pl. 32. Note, the case of Lamas *v.* Baily is stated in the same page.

(*z*) Mose. 39; and see Crop *v.* Norton, stated *infra*.

(*a*) Cases, *Dom Proc.* 1730.

defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on both sides. There was a contrariety of evidence, but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. But the Chancellor dismissed the bill without costs, and his decree was affirmed by the House of Lords.

Upon the whole, therefore, the better opinion perhaps is, that an agreement of this nature cannot be enforced, although certainly it does not appear that the precise point has ever been decided upon an absolute agreement clearly and undeniably proved.

From the case of Smith, treasurer of the West-India Dock Company *v.* the Mayor and Corporation of London (*b*), it should seem, that where two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase-money, before he can call for an inspection of the title-deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him in all transactions in which he duly acts according to his agency: and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase-money.

SECTION II.

Of Purchases in the Names of Third Persons.

I. If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all

(*b*) Ch. Dec. 16, 1801, and many previous days, MS.

the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others, without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase-money (*c*), unless such a resulting trust would break in upon the policy of an act of parliament (*d*). And although the person in whose name the conveyance is taken executes no declaration of trust, yet a trust will result for the person who paid the money by operation of law; this species of trust being expressly excepted out of the statute of frauds (*e*) (1).

But, unless the trust arise on the face of the deed itself, the proofs must be very clear (*f*): and however clear they may be, it seems doubtful whether parol evidence is admissible against the answer of the trustee denying the

(*c*) *Per* Lord C. B. Eyre, in Dyer *v.* Dyer, stated *infra*.

(*d*) See *ex parte* Houghton, 17 Ves. jun. 251; and see Redington *v.* Redington, 3 Ridg. P. C. 106.

(*e*) 29 Car. 2, c. 3, s. 8. See Hungate *v.* Hungate, Toth. 184; Gascoigne *v.* Thwing, 1 Vern. 366; Howe *v.* Howe, 1 Vern. 415; Anon. 2 Ventr. 361, n. (3); O'Hara *v.* O'Neil, 21 Vin. Abr. 497, n.; 2 Bro. P. C. 39; Pelly *v.* Maddin, 21 Vin. Abr. 498, pl. 15; Sir Darcy Lever *v.* Andrews, 7 Bro. P. C. by Tomlins, 288; Ambrose *v.* Ambrose, 1 P. Wms. 321; *ex parte* Vernon, 2 P. Wms. 549; Smith *v.* Baker, 1 Atk. 385; Lloyd *v.* Spillet, 2 Atk. 148; Withers *v.* Withers, Ambl. 15; Lade *v.* Lade, 1 Wils. 21; Smith *v.* Lord Camelford, 2 Ves. jun. 713; Rider *v.* Kidder, 10 Ves. jun. 360.

(*f*) Gascoigne *v.* Thwing, 1 Vern. 366; Newton *v.* Preston, Prec. Cha. 103; Willis *v.* Willis, 2 Atk. 71; and see 1 Atk. 60; Ambl. 414; Acherley *v.* Acherley, 4 Bro. P. C. 67; and Smith *v.* Wilkinson, 3 Ves. jun. 705, cited; and 1 Dick. 328; and see Lench *v.* Lench, 10 Ves. jun. 511; Groves *v.* Groves, 3 You. & Jerv. 163.

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(1) See 1 Will. c. 60, s. 16, for a provision against the infant heir-at-law of a nominal purchaser; and *supra*, vol. 1, p. 182.

trust (*g*). And in cases of this nature the claimant, in opposition to the legal title, should not delay asserting his right, as a stale claim would meet with little attention (*h*).

It has been said (*i*), that if the consideration-money is *expressed* in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such a conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted, *after the death of the nominal purchaser*, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries.

This proposition has been adopted by another writer (*k*), who says, that it should seem, that even the confession of the trust by the nominal purchaser, to countervail a declaration in writing, and create a trust for the party advancing the money, cannot be established by a third person, but must be made under *a judicial examination upon oath, or by the party's own answer in equity*. This, he adds, seems understood both in the case of Ambrose *v.* Ambrose, and Ryall *v.* Ryall; and appears to flow from the proposition before stated; for, during the life of the nominal purchaser, no proof can be received of his parol confession, as not being the best existing evidence; and after his death, it is mere parol evidence contradicting the deed, and not of strength to raise a resulting trust.

In the first edition of this work the author submitted it as his opinion, that the proposition, that parol proof could

(*g*) Skett *v.* Whitmore, 2 Freem. 289; Newton *v.* Preston, Prec. Cha. 103. See Cottington *v.* Fletcher, 2 Atk. 155; Bartlett *v.* Pickersgill, 4 East, 577, n. (*b*).

(*h*) Delane *v.* Delane, 7 Bro. P. C. by Tomlins, 279.

(*i*) See Mr. Sanders's note to Lloyd *v.* Spillet, 2 Atk. 150; and see his Essay on Uses, I. 123; and see the 3d edit. of that work, p. 259, 260.

(*k*) Rob. on Stat. of Frauds, 99.

not be admitted after the death of the nominal purchaser, was not warranted by the authorities referred to in support of it (*l*), and that the statute is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than it is by allowing such proof in his life-time. And this opinion seems to be confirmed by the case of Lench *v.* Lench (*m*). The question there was, whether a purchase by the late husband of the plaintiff of an estate was made with some trust-money of hers, of which he had obtained possession. Parol evidence was admitted of conversations with the husband, in order to prove the fact. Sir Wm. Grant, Master of the Rolls, after premising that there was not only no covenant by the husband to purchase land, but no stipulation in the settlement that land should be purchased, but merely a proviso, that the trustees, with the wife's consent alone, might invest the money in land, said, that as to the ground that the purchase was made with the trust-money, all depended upon the proof of the fact, *for whatever doubts might have been formerly entertained on this subject, it is now settled, that money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence.*—His Honor then examined the weight of the testimony, which he held to be too contradictory and uncertain to be depended upon. So, in Sir John Peachy's case (*n*), Sir Thomas Clark, Master of the Rolls, laid it down, that frauds were out of the statute of frauds, for that the Judges had resolved it was absurd that a statute which was made to prevent frauds should be made a handle to support them. And therefore, if *A* sold an

(*l*) Kirk *v.* Webb, Prec. Cha. 84; Walter de Chirton's case, cited *ib.*; Newton *v.* Preston, Prec. Cha. 133; Gascoigne *v.* Thwing, 1 Vern. 366; Hooper *v.* Eyles, 2 Vern. 480; Crop *v.* Norton, 2 Atk. 74.

(*m*) See Lench *v.* Lench, 10 Ves. jun. 511. The point, I am told, was lately decided the same way in Ireland.

(*n*) Rolls, E. T. 1759, MS.

estate to *C*, *and the consideration was expressed to be paid by B*, and the conveyance made to *B*, the Court would allow parol evidence to prove the money paid by *C*.

Where the evidence is merely parol, although it is clearly admissible, yet it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observed, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration.

So Lord Hardwicke laid it down that parol evidence might be admitted to show the trust, from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser (*o*).

In the late case of Leman *v.* Whitley, it was held that where an estate is conveyed by the owner to another as a purchaser, although he is really only a trustee, the nominal seller cannot by parol evidence alone make out a trust for himself, but he will have a lien on the estate for the purchase-money (*p*).

An express trust, although by parol only, will prevent the resulting trust (*q*); because resulting trusts are left by the statute of frauds and perjuries as they were before; and, previously to the act, a bare declaration by parol would prevent any resulting trust. Besides, an equitable

(*o*) Willis *v.* Willis, 2 Atk. 71; and see Ryall *v.* Ryall, 1 Atk. 59; Ambl. 413; and Lench *v.* Lench, 10 Ves. jun. 511.

(*p*) 4 Russ. 423; Cripps *v.* Jee, 4 Bro. C. C. 472, *sed qu.*

(*q*) Lady Bellasis *v.* Compton, 2 Vern. 294. See Lord Altham *v.* the Earl of Anglesea, Gilb. Eq. Rep. 16; Roe *v.* Popham, Dougl. 25.

presumption may be rebutted by parol evidence (*r*); for, as Lord Mansfield has observed, an equitable presumption is only a kind of *arbitrary implication* raised, to stand until some *reasonable proof* brought to the contrary.

Therefore parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially; and if satisfactory, he will be entitled to the estate (*s*); but the proof rests upon him to show, that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger (*t*).

Where a man merely employs another person by parol, as an agent to buy an estate, who buys it accordingly but denies the trust, *and no part of the purchase-money is paid by the principal*, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds (*u*).

And although the agent be afterwards convicted of perjury in denying the trust, yet that will not enable the Court to decree a performance *in specie* (*v*); and, therefore, as the principal cannot avail himself, in any civil proceeding, of the conviction of the agent, he is a competent witness to prove the perjury (*x*).

In Crop *v.* Norton (*y*), Lord Hardwicke appears to

(*r*) Langfielde *v.* Hodges, Lofft, 230; Rider *v.* Kidder, 10 Ves. jun. 360.

(*s*) Taylor *v.* Alston, cited in Dyer *v.* Dyer, Watk. Copyh. 216; S. C. MS.; Goodright *v.* Hodges, *ibid.* 227; Lofft, 230; 2 East, 534, n.; Maddison *v.* Andrews, 1 Ves. 57.

(*t*) See 3 Ridg. P. C. 178.

(*u*) Bartlett *v.* Pickersgill, Burr. 2255; 4 East, 577, n. (*b*). See Rastel *v.* Hutchinson, 1 Dick. 44.

(*v*) Bartlett *v.* Pickersgill, *ubi sup.*

(*x*) The King *v.* Boston, 4 East, 572. See Fell *v.* Chamberlain, 2 Dick. 484, *supra*, vol. 1, p. 114; and see the King *v.* Dalby, Peake's Ca. 12, and the cases cited in the note.

(*y*) 9 Mod. 233.

have been of opinion, that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. He said, " this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons; for this would introduce all the mischief which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money appears to be paid by him only, I do not know any case where such persons shall come into this Court, and say they paid the purchase-money; but it is expected there should be a declaration of trust."

In the case of Wray *v.* Steel, the point called for a decision, and Sir Thomas Plumer, Vice-Chancellor, following the true principle, decided in favour of the resulting trust. What, his Honor asked, is there applicable to an advance by a single individual that is not equally applicable to a joint advance under similar circumstances (*z*)?

II. Before the statute of uses, if a father made a feoffment to a stranger without any consideration, the law raised an use by implication to himself; but if he made a feoffment to his son, no use arose to the father by implication; because the blood, which is a sufficient consideration, fixed and settled the estate in the son. And herein the law of trusts doth (as it ought to do) agree with the law of uses before the statute of H. 8. (*a*).

Therefore, if a father purchase in the name of a child, although illegitimate (*b*), who is without a provision (*c*),

(*z*) 2 Ves. & Beam. 388.

(*a*) See Rep. *t.* Finch, 341.

(*b*) Beckford *v.* Beckford, Lofft, 490; Fearne's Posthuma, 327; Fonblanque's n. (1) to 2 Trea. Eq. 127, 2d edit.

(*c*) Elliot *v.* Elliot, 2 Cha. Ca. 231; and see Rep. *t.* Finch, 341.

or in the joint names of such a child and of another person (*d*), it will not be deemed a resulting trust for the father but a gift or advancement for the child (*e*); because a father is under an obligation of duty and conscience to provide for his child in such case. And if the father die without having paid all the purchase-money, his personal estate must pay it for the benefit of his child (*f*).

Where, by the custom of a manor, copyholds are granted for lives *successive*, it has been holden, that if the father pay the fine, a grant to children, as nominees, shall not be an advancement for them, but a trust for the father (*g*), and there seems some ground to support this distinction; because the father could not have taken the whole estate in his own name.

But this decision has been over-ruled, and it is now settled, that such a purchase is, upon the general rule, an advancement for the children, and not a trust for the father (*h*), where the grant is immediate to the children, or even to the father for their lives, if they can, according to the custon of the manor, take at law under such a grant (*i*): nor is it material that the purchase is of a reversion expectant upon the death of a stranger (*j*).

A purchase by a papist incapable of purchasing, in the name of a protestant son, was considered a stronger case for an advancement than a purchase by a protestant

(*d*) Lamplugh *v.* Lamplugh, 1 P. Wms. 112.

(*e*) Lady Gorge's case, 3 Cro. 550, cited; Lord Grey *v.* Lady Grey, 1 Cha. Ca. 296; 2 Swanst. 594; Mumma *v.* Mumma, 2 Vern. 19; Shales *v.* Shales, 2 Freem. 252; 1 Eq. Ca. Abr. 382, pl. 9; Anon 2 Freem. 128, pl. 151; Taylor *v.* Taylor, 1 Atk. 386.

(*f*) Redington *v.* Redington, 3 Ridgway's P. C. 106. See Redington *v.* Redington, 9th July 1805, printed case House of Lords.

(*g*) Dickenson *v.* Shaw, cited in Dyer *v.* Dyer, Watk. Copyh. 216; S. C. MS.

(*h*) Dyer *v.* Dyer, *ubi sup.*; and see Swift *v.* Davis, 8 East, 354, n.

(*i*) See Right *v.* Bawden, 3 East, 260; Smartle *v.* Penhallow, Lord Raym. 994.

(*j*) Finch *v.* Finch, 15 Ves. jun. 43.

parent; because otherwise a constructive trust prohibited by statute would have been raised (*k*).

It has already been observed, that to make it an advancement, the child must be unadvanced; but an advancement in part is not material (*l*); and a child having only a reversion expectant upon a life-estate, will be considered as unadvanced (*m*); and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient (*n*).

If the child is already provided for, and the father did not consider him unadvanced (*o*), or if the father considered the child, from the first, as a trustee for him, he will be held to be so (*p*); but the proof of this lies on the side of the person wishing to defeat the child's claim; and it seems, that although parol evidence of verbal declaration is admissible in support of the deed, it is inadmissible to create a trust against it (*q*).

In Swift *v.* Davis (*r*), where a father was the sole purchaser of an estate for three lives, who would take *successive*, and put in the lives of himself and his two sons; and at the same court obtained a license from the lord to himself and his mother (who had her widowhood-right in the copyhold) to lease for seventy years, Lord Kenyon laid it down, that in such a case, if the father afterwards grant a lease by way of mortgage pursuant to such license to lease, and there be a custom in the manor for the first taker to

(*k*) Redington *v.* Redington, 3 Ridg. P. C. 106. See *ex parte* Houghton, 17 Ves. jun. 251. 10 Geo. 4.

(*l*) See Rep. *t.* Finch, 326.

(*m*) Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

(*n*) Redington *v.* Redington, *ubi sup.*

(*o*) Elliot *v.* Elliot, 2 Cha. Ca. 231.

(*p*) Woodman *v.* Morrell, 2 Freem. 32; Swift *v.* Davis, 8 East, 354, n. See Murless *v.* Franklin, 1 Swanst. 13.

(*q*) Shales *v.* Shales, 2 Freem. 252; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Taylor *v.* Taylor, 1 Atk. 386; Redington *v.* Redington, 3 Ridg. P. C. 106; Finch *v.* Finch, 15 Ves. jun. 43.

(*r*) 8 East, 354, n.

dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee. Or, if there were any doubt of that, or if the license of the lord might be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first taker *alone* executed such license after her death, yet a court of equity (even if the surviving life (the son) succeeded at law on his strict legal title) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity.

So a surrender by the father to the use of his will immediately after the grant makes the son a trustee for the father (*s*).

Possession by the father, during the infancy of his child (*t*), will not be deemed subversive of the child's claim; for it cannot be supposed the parent would have named a youth as a trustee; and therefore his taking the profits must be intended to have been done by him as guardian to the son. In an early case (*u*), indeed, the tender years of the child was considered as evidence that the father did not purchase for his benefit, because he was too young to need an advancement.

A distinction has been drawn where the parent has taken the profit after the child's coming of age, and when of discretion to claim his right (*v*); in which case, it is said, the child shall be a trustee for the father. But this cannot be depended on. It seldom happens that the

(*s*) Prankerd *v.* Prankerd, 1 Sim. & Stu. 1.

(*t*) See Finch, 340, 341; Lamplugh *v.* Lamplugh, 1 P. Wms. 112; Mumma *v.* Mumma, 2 Vern. 19; Redington *v.* Redington, 3 Ridg. P. C. 106. Note, the case of the Attorney-general *v.* Bagg, Hard. 135, turned on fraud.

(*u*) Sir George Binion *v.* Stone, Nels. Cha. Rep. 68; 2 Freem. 169. See King *v.* Denison, 1 Ves. & Bea. 260.

(*v*) Lloyd *v.* Read, 1 P. Wms. 608; and see Gilb. Lex Prætoria, 271.

father gives the son possession during his life; and yet, as the Court observed in the case of Lord Grey *v.* Lady Grey (*x*), in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence, and not by any argument or inference from the father's continuing in possession, and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part.

So the circumstance of the parent laying out money in repairs and improvements will not make the child a trustee (*y*).

A declaration of trust by the father, *subsequently* to the conveyance, will not divest the gift to the child (*z*); and therefore a devise by him of the estate will be inoperative (*a*).

It is, however, quite clear, that according to the general rule of equity, if the father devise to another the estate bought in the name of the child, and make other provision for the child by his will, he would at this day be put to his election; although in the early case of Shales *v.* Shales (*b*), where these circumstances occurred, the child was not put to his election.

If the conveyance of the fee to a son is proved to be for a particular purpose, as to sever a joint-tenancy, the child will be a trustee for the father (*c*).

A purchase by a father, in the joint names of *himself*

(*x*) Rep. *t.* Finch, 340.

(*y*) Shales *v.* Shales, 2 Freem. 252; Mumma *v.* Mumma, 2 Vern. 19.

(*z*) Woodman *v.* Morrell, 2 Freem. 32; Elliot *v.* Elliot, 2 Cha. Ca. 231. See Redington *v.* Redington, 3 Ridgw. P. C. 106.

(*a*) Mumma *v.* Mumma, 2 Vern. 19; Dyer *v.* Dyer, Watk. Copyh. 216; S. C. MS.

(*b*) 2 Freem. 252.

(*c*) Baylis *v.* Newton, 2 Vern. 28; and see Birch *v.* Blagrave, Ambl. 264; Sir Walter Raleigh's case, Hard. 497, cited.

and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim (*d*).

But a purchase in the names of father and son, as joint-tenants, has not been considered so strong a case for an advancement as it formerly was; it is said, that it does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son dies during his minority, the father would be entitled to the whole by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant (*e*). And accordingly, in a case (*f*) where a father purchased an estate in the names of himself and son, and had *no other estate* to which a judgment-creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors (*g*).

But there does not appear to be much weight in the reasons above stated. It is evident that a moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship which the father takes is an incident to the tenancy, and extends equally to the son, who, after he attains his majority, may sever the joint-tenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase-money, and perhaps took the conveyance to himself and son as joint tenants, with the express view of advancing him only in the event of his attaining that age

(*d*) Scroope *v.* Scroope, 1 Cha. Ca. 27.

(*e*) *Per* Lord Hardwicke, 2 Atk. 480; and see Pole *v.* Pole, 1 Ves. 76.

(*f*) Stileman *v.* Ashdown, 2 Atk. 477.

(*g*) See 13 Eliz. c. 5.

at which the law considers a man capable of managing his fortune. During the son's minority and the life of his father, upon whom should he be dependent if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps, it is impossible to contend with success, that a purchase by a parent in the name of himself and child, as joint tenants, is not as strong a case for an advancement as a purchase in the name of the child solely. Fraud is of course an exception to every rule.

A purchase in the name of a child solely, or jointly with the parent's name, is not, however, within the 27 Eliz. (*h*), And therefore a subsequent purchaser, although *bonâ fide*, will not be relieved against it (*i*).

But such a purchase fell expressly within the letter of the 21st of James 1. (*j*) if the father was a trader at the time; and his being solvent would not protect the purchase (*k*). But if the purchase was made before the father engaged in trade, and without any fraudulent purpose of becoming a bankrupt, it would have been good, although the father afterwards commenced tradesman, and was made a bankrupt (*l*).

The law was partially altered by the 6 Geo. 4, c. 16, s. 73, which only gives to the creditors the benefit of the purchase, where the bankrupt *is at the time insolvent*. It deserves serious consideration whether the law should not be restored.

If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child;

(*h*) C. 4.

(*i*) Lady Gorge's case, 3 Cro. 550, cited.

(*j*) C. 15. s 5. See Walker *v.* Burrows, 1 Atk 93.

(*k*) Fryer *v.* Flood, 1 Bro. C. C. 160; Glaister *v.* Hewer, 8 Ves. jun. 195.

(*l*) Crisp. *v.* Pratt, Cro. Car. 548; Lilly *v.* Osborn, 3 P. Wms. 298; and see 8 Ves. jun. 200, 204.

for on the death of the father, the grandchild is under the protection of the grandfather (*m*); but in Lloyd *v.* Read (*n*) this distinction does not seem to have been attended to. The case, however, depended upon its own peculiar circumstances.

So a purchase by a husband in the name of his wife is also deemed an advancement and provision for her (*o*). But if a purchase in the name of wife or child be after marriage, and voluntary, it may perhaps be fraudulent as against creditors (*p*), in like manner as if the settlement was of property actually vested in the husband, in even which case it seems that the husband must be proved to have been indebted at the time of the settlement to the extent of insolvency, in order to affect the settlement (*q*). It has, however, been strenuously argued, that a *purchase* is not within the operation of the statute of 13 Eliz.; for, as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him; and this seems to be the better opinion, where the case is clear of actual fraud (*r*).

A purchase by a *trader* in the name of his wife seems subject to the same rules as a purchase by a trader in the name of his child (*s*). But a purchase by a trader of the land-tax on his wife's estate, for her benefit (*t*), or of an enfranchisement of his wife's copyhold estate, or money laid out by him in building on her estate, being mere

(*m*) Ebrand *v.* Dancer, 2 Cha. Ca. 26.

(*n*) 1 P. Wms. 608.

(*o*) Kingdome *v.* Bridges, Back *v.* Andrews, 2 Vern. 67, 120.

(*p*) Christ's Hospital *v.* Budgin, 2 Vern. 683.

(*q*) See Lush *v.* Wilkinson, 5 Ves. jun. 384.

(*r*) See Fletcher *v.* Sidley, 2 Vern. 490; Proctor *v.* Warren, Sel. Cha. Ca. 78; and 8 Ves. jun. 199.

(*s*) See Glaister *v.* Hewer, 8 Ves. jun. 195; 9 Ves. jun. 12; 11 Ves. jun. 377.

(*t*) Burrough's case, 17 Ves. jun. 267, cited.

voluntary expenditure, cannot be made a ground of charge against her or her estate by his creditors, although he was insolvent at the time (*u*).

On this subject it remains only to remark, that Lord Chief Baron Gilbert observes (*x*), that a difference is taken between a purchase in the name of a son and of a daughter; for though sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption is not so strong. The learned author does not, however, refer to any case in support of his position; and in Lady Gorge's case she appears to have enjoyed an estate purchased by her father, the Earl of Lincoln, in her name (*y*). Indeed, admitting the *general* rule, as to providing for daughters by settlement of lands, *where there is a son*; yet, in the case under consideration, the purchase itself is strong evidence of the intent, more especially as a woman is an unfit trustee of a real estate.

SECTION III.

Of Purchases with Trust Money.

If a trustee, or executor, purchase estates with his trust-money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money can be clearly proved. And the same principle applies to a purchase by a husband with trust-money belonging to his wife, of which he may have obtained possession from the trustee, whether with or without the wife's

(*u*) Campion v. Cotton, 17 Ves. jun. 263.

(*x*) Lex Prætoria, 272.

(*y*) Lady Gorge's case, 3 Cro. 550, cited.

consent; or to a purchase by an agent or steward with monies remitted to him by his principal (*z*).

In the old cases (*a*) the courts of equity were much more strict in the proof they admitted of the application of the money than they now are; but it was always very clear, that upon sufficient proof of the trust-money having been laid out in the purchase of the estate, a trust would result and be decreed accordingly (*b*). Parol evidence is, in these cases, admissible either in the life-time, or after the decease of the trustee: but unless there are corroborating circumstances, as a writing under the trustee's hand, stating the application of the money, or the inability of the trustee to make the purchase with other funds (*c*), mere parol evidence of declarations supposed to be made by the purchaser will be received with great caution.

Where a trustee or agent is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust (*d*).

But if a trustee has considered himself entitled to the trust-money for his own benefit, no presumption can be raised in opposition to this fact, that he intended any lands he may have bought with the trust-money to be subject to the trust (*e*).

(*z*) Bennet *v.* Mayhew, 1 Bro. C. C. 232; 2 Bro. C. C. 287, cited.

(*a*) Kirk *v.* Webb, Prec. Cha. 84; Heron *v.* Heron, Prec. Cha. 163; Halcot *v.* Markant, Prec. Cha. 168; Kendar *v.* Milward, 2 Vern. 440; Prec. Cha. 171. See Cox *v.* Bateman, 2 Ves. 19.

(*b*) Anon. Sel. Cha. Ca. 57; Lane *v.* Dighton, Ambl. 409; Balgney *v.* Hamilton, cited *ibid.*; Ryall *v.* Ryall, 1 Atk. 59; Ambl. 413; and see Earl of Plymouth *v.* Hickman, 2 Vern. 167.

(*c*) See Lench *v.* Lench, 10 Ves. jun. 511; Wilson *v.* Foreman, 2 Dick. 593, as corrected by the Master of the Rolls, 10 Ves. jun. 519; and see Anon. Sel. Cha. Ca. 57.

(*d*) See the cases in Sect. 4, *infra*.

(*e*) Perry *v.* Phelips, 4 Ves. jun. 108; 17 Ves. jun. 173; and see Cox *v.* Paxton, 17 Ves. jun. 329; Savage *v.* Carroll, 1 Ball & Beatty, 265; *supra*, Vol. 1, p. 180.

Here we may introduce a case, where a man, on his marriage, contracted to assure all such personal estate as he should, during the joint lives of him and his wife, be possessed of, upon certain trusts. He purchased a real estate, for which he paid partly out of his own monies, and partly out of monies borrowed on his personal security. It was insisted, that the real estate was bound by the trusts: but Lord Eldon determined, that it belonged to the heir, but charged for the benefit of the persons claiming under the trust, with the purchase-money paid by the husband out of his own funds and lasting improvements on the estate; and also with the money borrowed, which he in his life-time paid off out of his personal estate, and the estate was held the primary fund for payment of the money borrowed. In this case it will be seen that the application of the settled fund was clearly traced, for all the husband's personal estate was bound by the settlement; and the only question was, whether the *cestui que trust* should have the estate, or the trust-fund laid out in the purchase of it (*f*).

SECTION IV.

Of the Performance of a Covenant to purchase and settle an Estate.

Where a man covenants to purchase and settle, or, having no real estate, to *convey* and settle lands, and afterwards accordingly purchases lands of equal or greater value, but neglects to settle them, yet they shall be held to have been purchased with an intent to perform the

(*f*) Lewis *v.* Madocks, 8 Ves. jun. 150; 17 Ves. jun. 48. See Denton *v.* Davies, 18 Ves. 499.

covenant, and shall accordingly go in performance of it (*g*), and the heir must give up the estate, although he is not the person entitled to the benefit of the covenant (*h*).

It is even a general rule in equity, that where a man covenants to do an act, and he does that which may *pro tanto* be converted to a completion of the covenant, he shall be presumed to have done it with such intention (*i*). Therefore, where the covenantor has purchased lands, but not of sufficient amount to wholly perform the covenant, yet they shall go in performance of it as far as they will extend (*k*). It may not be possible to lay out all the money in one purchase; but that is not a sufficient reason why the estates actually purchased should descend to the heir at law for his own benefit, to the entire ruin, perhaps, of the rest of the family.

The like principle has been extended to a case where the covenantor was to *pay* the money to *trustees*, to be by them laid out in the purchase of estates (*l*).

It is not material in these cases, that the purchase was to be made with the consent of persons whose consent was never even applied for (*m*), or within a limited time, and the purchase was not made till after the expiration of the time appointed (*n*). Nor is it important that there was a subsisting mortgage on the estate, upon which the covenantor took up money from another person in order to enable him to complete the purchase (*o*). And it will

(*g*) Wilcocks *v.* Wilcocks, 2 Vern. 558; Deacon *v.* Smith, 3 Atk. 323.

(*h*) Garthshore *v.* Chalie, 10 Ves. jun. 9.

(*i*) See Sowden *v.* Sowden, Cox's n. 3 P. Wms. 228.

(*k*) Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; For. 80; MS. App. No. 24, a fuller note of this part of Lord Talbot's judgment; Whorwood *v.* Whorwood, 1 Ves. 540; Sowden *v.* Sowden, 3 P. Wms. 228, n.; 1 Bro. C. C. 582. See 4 Ves. jun. 116, 117; 10 Ves. jun. 9. 516; Gardner *v.* Lord Townsend, Coop. 301.

(*l*) Sowden *v.* Sowden, 1 Bro. C. C. 582.

(*m*) Lechmere *v.* Earl of Carlisle, *ubi sup.*

(*n*) S. C.; and see 3 Atk. 329.

(*o*) Deacon *v.* Smith, 3 Atk. 323.

not vary the case, that the covenantor had an option to settle a rentcharge instead of the lands themselves, unless he have shown an intention to avail himself of his right to elect (*p*).

But where a clear intent appears to *lay out* the entire sum in the *future* purchase of lands, estates of which the covenantor was seised at the time of the covenant, and which he permitted to descend, cannot go in performance of the agreement, because such clearly could not have been his intention (*q*).

And, to enure as a performance, the property purchased must be such as will answer the intent of the settlement (*r*). Therefore, under a covenant to purchase fee-simple lands in possession, estates in reversion, expectant upon lives will not go in performance (*s*), unless, perhaps, they fall into possession in the covenantor's life-time; neither will leaseholds for lives, nor terms of years, even with covenants to purchase the fee, go in performance, as they cannot descend to the heir (*t*).

So a moiety of a house would not be considered a kind of property within a covenant to purchase lands of inheritance: nor would lands, having a different descent, as borough English lands, which descend to the youngest son, instead of lands descendible to the eldest son, according to the course of the common law (*u*). Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent compliance with the terms of the settlement, as where the estate is to be settled on one for life *without impeach-*

(*p*) Deacon *v.* Smith, 3 Atk. 323.

(*q*) Lechmere *v.* Earl of Carlisle, For. 80, *et ubi sup.* See Davys *v.* Howard, 5 Bro. P. C. 552.

(*r*) See Lewes *v.* Hill, 1 Ves. 274.

(*s*) Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; Deacon *v.* Smith, 3 Atk. 323; Whorwood *v.* Whorwood, 1 Ves. 540.

(*t*) Lechmere *v.* Earl of Carlisle, *ubi sup.*

(*u*) Pennill *v.* Hallett, Ambl. 106.

ment of waste (*x*). But where this circumstance does not occur, copyhold estates may, it should seem, go in part performance of a covenant to purchase real estates (*y*), although Lord Hardwicke seems to have doubted whether copyhold lands could go in performance, as they are liable to different tenures and to forfeiture (*z*).

Where the purchase was made *bonâ fide* with an intent to perform the covenant, the lands must, it is conceived, in most cases be taken at the price paid for them (*a*), or at least at their value at that time. This construction, however, is not made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement, and therefore they could not be followed in the hands of the purchaser (*b*). But it is no objection in these cases that the arrangement will affect specialty creditors, for it is in the power of the owner of the estate to prefer one specialty creditor to another, because none of them have any specific lien on the lands (*c*).

It may be considered as a general rule, although it may not hold universally true, that, a covenant to convey and settle lands, will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty. In one case, where a man gave a bond, before marriage, to convey sufficient freehold or copyhold estates, to raise 600 *l.* per annum, for his intended wife, in bar of dower, she was decreed to be a creditor, by specialty of her husband, and to be entitled to be paid the arrears of her annuity out of his personal estate, in a course of administration; and if the same should not be sufficient,

(*x*) Pennill *v.* Hallett, Ambl. 106.

(*y*) Wilks *v.* Wilks, 5 Vin. Abr. 293, fol. 39. Note, the covenant was generally to purchase *lands*.

(*z*) Whorwood *v.* Whorwood, 1 Ves. 540.

(*a*) Lechmere *v.* Earl of Carlisle, For. 80. See and consider Pennill *v.* Hallett, Ambl. 106.

(*b*) Smith *v.* Deacon, 3 Atk. 323.

(*c*) S. C.

then out of the real estates of which he died seised in fee-simple, *and if those should not be sufficient, then out of the real estates in settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would have been entitled to thereout, in case she had not accepted the annuity for her life, as aforesaid* (*d*). Lord Thurlow, in a subsequent stage of the cause, said, that the Court had charged the real, in aid of the personal, by a very subtle equity, because, if she had not made a contract of forbearance of dower, the entailed estate would have been liable to her dower.

(*d*) Forster v. Forster, 3d Feb. 1787, MS. See 5 Bro. C. C. 490. Consider now the operation of the 3 & 4 Will. 4, c. 105.

CHAPTER XVI.

OF THE PROTECTION AND RELIEF AFFORDED TO PURCHASERS BY STATUTES, AND BY THE RULES OF EQUITY.

IN the former chapters an attempt has been made to trace the purchase from its inception by contract, to its completion by conveyance; the subjects which may be said to arise out of the conveyance have been treated of; and it has been considered who are incapable of purchasing estates. Let us now suppose the purchase to be completed, and proceed to inquire to what protection and relief purchasers are entitled. The protection and relief afforded to purchasers appear to arise either from positive statutes, or from the rules of equity. The common law hath, indeed, done all which, from its peculiar nature, it can do in support of the claims of *bonâ fide* purchasers; for we are told, that the maxims of the common law, which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and strengthen the rights of purchasers (*a*). Lord Mansfield indeed held, that in every case between purchasers for valuable consideration, a court of equity must *follow*, and not *lead* the law. And the rules of equity were, in his time, pretty generally adopted in the courts of law (*b*). It could not long escape observation, that from the peculiar constitution of this

(*a*) Finch, 104. See Bac. on Uses, 36. They are now mostly altered by the late statutes.

(*b*) Keech *v.* Hall, Dougl. 22; Weakley *v.* Bucknell, Cowp. 473. This practice did not escape the inquiring eye of Junius; see vol. 2. 41, 384.

country, the rules of law and equity ought ever to continue distinct; and accordingly all the great Judges who have succeeded Lord Mansfield have determined that the legal estate must prevail at law (*c*). We need, therefore, only consider, first, the statutes which have been passed for the protection or relief of purchasers: and, secondly, the rules of equity in favour of purchasers.

SECTION I.

Of fraudulent and voluntary Settlements, and Settlements with Powers of Revocation.

I. First then. By 27 Eliz. c. 4. (*d*) it is enacted, that all conveyances, grants, &c. out of any lands, tenements, or other hereditaments, to be had or made *for the intent and of purpose to defraud and deceive* such persons as shall purchase the same lands, tenements, or other hereditaments, so formerly conveyed, granted, &c. or any rent, profit or commodity, in or out of the same, shall be deemed and taken only as against such persons and their representatives as should so purchase for money or other good consideration, the same lands, tenements, or other hereditaments, or any rents, profits, or commodity in or out of the same, to be utterly void.

But it is provided, that the act shall not extend to make void any conveyance, &c. to be made for good consideration, and *bonâ fide*, to any person.

And it is also enacted, that if any person shall make any conveyance, &c. of any lands, tenements or hereditaments, with any clause of revocation or alteration at his

(*c*) See 5 East, 138; 6 Ves. jun. 174; 3 Bos. & Pull. 162; and 1 Scho. & Lef. 66; Doe *v.* Morris, 1 Taunt. 52.

(*d*) Made perpetual by 30 Eliz. 18, s. 3.

pleasure of such conveyance, &c. and shall afterwards sell the same to any person or persons for money or other good consideration paid or given (the said first conveyance, &c. not being revoked according to the power reserved by the said *secret* conveyance, &c.), then the said first conveyance, &c., as touching the lands, tenements, and hereditaments so after sold, against the vendees, &c. shall be deemed and be void, and of none effect; provided that no *bonâ fide* mortgage should be affected by the Act.

To take advantage of this statute, a person must have purchased *bonâ fide* and for a valuable consideration, but the Court will not enter into the adequacy of the consideration, unless it was so small as to be palpably fraudulent (*e*). Whatever consideration would be sufficient to support an original settlement will be sufficient to avoid a prior voluntary one. The subject of the sale must, however, be an existing lawful interest. Thus in a case mentioned by Sir Edward Coke, in his Commentary on Littleton (*f*), *A* had a lease of certain lands for sixty years, if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease, and all his interest in the land to *B*. Sir Edward Coke adds, that it seemed to him that *B* was no purchaser within the statute of 27 Eliz., for he contracted not for the true and lawful interest, for that was not known to him; for then perhaps he would not have dealt for it, and the visible and known term was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for

(*e*) Upton *v.* Bassett, Cro. Eliz. 444; Doe *v.* Routledge, Cowp. 705; Needham *v.* Beaumont, 3 Rep. 83, b; 2 And. 233; Doe *v.* Routledge, Cowp. 705. See Bullock *v.* Sadlier, Ambl. 764; Hill *v.* Bishop of Exeter, 2 Taunt. 69; Doe *v.* James, 16 East, 212. See 1 Ves. & Beam. 184; Treatise of Powers, 4th edit. p. 418.

(*f*) Co. Litt. 3, b. See Hatton *v.* Jones, Bull. N. P. 90.

it. And of this opinion were all the Judges in Sergeant's Inn. It is, however, a very narrow construction.

In the construction of this Act it hath been holden, that although the fraudulent conveyance is not made by the vendor himself, yet it is void against a purchaser. Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence (*g*).

And the statute being general, and made to suppress fraud, extends to fraudulent conveyances to the King. Therefore, in the case of Magdalen College (*h*), it was resolved by Lord C. J. Coke, that if tenant in tail be seised of land, the remainder over in tail or in fee, and he in remainder knowing the tenant in tail will alien the land, and by recovery bar his remainder, to the intent to deprive the tenant in tail of his birthright, and the power which the law gives him to bar the remainder, and on purpose and with intent to deceive the purchaser, grants his remainder to the Queen by deed enrolled, and afterwards tenant in tail, for a valuable consideration, aliens the land by a common recovery, and dies without issue, the purchaser shall enjoy the lease against the Queen, by the statute of Elizabeth. And of such opinion was Popham, C. J. openly in the Exchequer Chamber. This is a very important resolution, and shows in the strongest view, how liberal a construction this statute hath received, for the Queen was not a party to the fraud, and by her prerogative at common law the reversion in her could not be affected by a common recovery (*i*).

(*g*) Burrell's case, 6 Rep. 72; Jones *v.* Groobham, Co. Litt. 3 b.; Warburton *v.* Loveland, 1 Dow. & Clark, 497.

(*h*) 11 Rep. 66.

(*i*) See Wiseman's case, and Chomley's case, 2 Rep. 15. 50; and see 2 Ro. Abr. 393, T. Recoverie Common; see 3 & 4 Will. 4, c. 74.

It hath been determined (*k*), that notice to a purchaser of a fraudulent conveyance is of no consequence, for the statute makes it absolutely void.

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within this statute, against a subsequent purchaser for valuable consideration (*l*).

But if the conveyance were made with an honest intent, and the purchaser had notice of the trust, it seems that he will not be relieved against it (*m*). And upon the whole, as Mr. Roberts justly remarks (*n*), these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title which has been at all the subject of arrangements for the payment of debts remaining unsatisfied.

II. It has in numerous cases been holden, that voluntary settlements are within the meaning of the Act, although the purchaser had direct notice of the settlement at the time of his purchase. This doctrine has, however, been frequently questioned, but appears to have been incontrovertibly settled by the case of Taylor *v.* Stile (*o*), which arose in Yorkshire.

In that case, *A* settled lands, after his marriage, on his wife for life, and then sold the lands to *B*, who had notice of the wife's estate for life, and took counsel's opinion on the point. *A* died, and his wife brought her bill to be let into her life estate. Lord Northington held the law to be clear, that a subsequent purchaser for a valuable con-

(*k*) Gooch's case, 5 Co. 60, a.

(*l*) Leech *v.* Leech, 1 Cha. Ca. 249. See Wallwyn *v.* Coutts, 3 Mer. 707.

(*m*) Langton *v.* Tracey, 2 Cha. Rep. 16. See Stevenson *v.* Hayward, Prec. Cha. 310.

(*n*) Vol. Conv. 335.

(*o*) Chancery, 1763, MS.; and see Evelyn *v.* Templar, 2 Bro. C. C. 148.

sideration, though with notice, should set aside a voluntary settlement; but it being suggested that there was no valuable consideration, an issue was directed to try that fact, which coming on before Mr. Justice Bathurst, at York, he suffered the counsel to enter into the equity; and after hearing the argument, said, he knew Lord Hardwicke had determined, in twenty instances, in the same manner as Lord Northington. The consideration was proved, and the case came on to be heard before the Chancellor on the equity reserved, who thereupon dismissed the bill.

And in a recent case, Lord Chief Justice Mansfield held, that the Court could not, without overturning the settled and decided law, hold that the prior voluntary conveyance could defeat a conveyance to a purchaser for a valuable consideration (*p*). The point has been recently decided the same way by the Court of Exchequer (*q*), and since that, by the Court of King's Bench (*r*), although in the last case the purchaser had notice of the settlement; and upon a trial at *nisi prius*, Mr. Justice Heath attached some importance to the circumstance of notice, and the jury found for the defendants claiming under the settlement, conceiving, as I am told, the settlement not to be fraudulent within the statute, though voluntary. In a still later case, the rule was again confirmed by the Court of Common Pleas (*s*). Nor will a purchaser be affected by a covenant in the settlement, that the purchase-money should be paid to trustees, to be laid out by them in other lands to be settled to the same uses (*t*).

But a deposit of the title-deeds by a settler *after* a

(*p*) Doe *v.* Martyr, 1 New Rep. 332.

(*q*) Doe *v.* Hopkins, 9 East, 70, cited.

(*r*) Doe *v.* Manning, 9 East, 59.

(*s*) Hill *v.* Bishop of Exeter, 2 Taunt. 69; and see 18 Ves. jun. 141, *per* Sir Wm. Grant; and see Gully *v.* Bishop of Exeter, 10 Barn. & Cress. 601.

(*t*) Evelyn *v.* Templar, 2 Bro. C. C. 148. See 18 Ves. jun. 91. 93. 112.

voluntary settlement, will not prevail at law against the settlement; trover may be maintained for the deeds. The Court, in the case (*u*) in which this point arose, observed, that upon the deposit of the deeds the defendants required no more than a right to go into a Court of Equity to compel a legal conveyance. The language of the statute clearly specifies a purchaser; and how could they say that, upon a mere deposit of deeds entitling the party perhaps to apply to a Court of Equity, he becomes, in the language of the act, a purchaser either in fee-simple, fee-tail for life, lives or years?

Here it will be proper to consider, what is a voluntary settlement, and what will be deemed a valuable consideration within the act, so as to protect a settlement against subsequent purchasers.

Any conveyance executed by a husband in favour of his wife or children, after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue, is voluntary, and void against purchasers by force of the act (*v*).

But a *purchase* in the name of a wife or child is not within the intention of the act, and consequently cannot be defeated by a subsequent purchaser (*x*): and on the ground of policy, it seems that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, will not be deemed fraudulent (*y*).

And a settlement made on a wife or children, *prior* to marriage, is a conveyance for valuable consideration, by reason of the marriage itself (*z*), but a settlement after a

(*u*) Kerrison *v.* Dorrien, 9 Bingh. 76; 2 Moo. & Scott, 114.

(*v*) Woodie's case, cited in Colvile *v.* Parker, Cro. Jac. 158; Goodright *v.* Moses, 2 Blackst. 1019; Chapman *v.* Emery, Cowp. 278; Evelyn *v.* Templar, 2 Bro. C. C. 148. See Parker *v.* Serjeant, Finch, 146.

(*x*) *Supra*, ch. 15, s. 2, div. 11.

(*y*) Newstead *v.* Searles, 1 Atk. 265. See Cowp. 280; Cotton *v.* King, 2 P. Wms. 674.

(*z*) Colvile *v.* Parker, Cro. Jac. 158; Douglas *v.* Ward, 1 Cha. Ca. 99; Brown *v.* Jones, 1 Atk. 188.

marriage in Scotland, will not be deemed a settlement upon valuable consideration, although, subsequently to it, the marriage is re-celebrated in England (*a*).

The marriage consideration runs through the whole settlement, as far as it relates to the husband, and wife, and issue (*b*). Whether the marriage consideration will extend to remainders to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser, is a subject which has been frequently discussed (*c*).

In a case in Lane (*d*), it is stated to have been held, that "if a man doth, in consideration that his son shall marry the daughter of *B*, covenant to stand seised to the use of the son, for life, and after to the use of other his sons, in reversion or remainder; these uses, thus limited in remainder, are fraudulent against a purchaser, though the first be upon good consideration, viz. marriage."—In this case, therefore, although the settler was under a moral obligation to provide for his sons, yet the remainders were not held good. They were, it will be observed, to take effect after a vested estate for life only. The case of Jenkins *v.* Keymis (*e*) has sometimes been considered a case, where the consideration of a marriage, and marriage portion, was held to run through all the estates raised by the settlement on the marriage, though the marriage was not concerned in them (*f*). The point, however, was not decided. It was merely the inclination of Hale's opinion. It was not necessary to decide the point, for Sir Nicholas was tenant for life, and Charles tenant in tail, with remainders over; the concurrence of both, therefore, was essential to give effect to the settlement, which brings it within

(*a*) *Ex parte* Hall, 1 Ves. & Beam. 112.

(*b*) Nairn *v.* Prowse, 6 Ves. jun. 752.

(*c*) See 6 Ves. jun. 750; 18 Ves. jun. 92.

(*d*) Lane, 22; and see 2 Ro. Rep. 306; Jason *v.* Jervis, 1 Vern. 286.

(*e*) 1 Lev. 150. 237; 1 Cha. Ca. 105.

(*f*) See 9 East, 69.

the rule laid down in Roe *v.* Mitton (*g*). Besides, the son paid to his father the portion which he received with his wife (*h*). Lord Keeper Bridgman is also reported, by Levinz, to have agreed with Hale, that the marriage and portion of the first wife would extend to the issue of the second; but this opinion was extra-judicial, inasmuch as he relieved against the defective execution of the power (*i*); and it is observable, that no such opinion is stated in the report in Chancery (*k*). The case of White and Stringer (*l*) does appear to be an authority for such limitations, after a *vested* estate-tail; *the remoteness of the remainder was much relied upon in its favour*. But even in that case there were special circumstances; the remainder was excepted in the purchase deed, and the purchaser took a collateral security against it. It may be thought, therefore, that he only purchased the reversion in fee which was in the settler from whom he bought. The case of Osgood *v.* Strode (*m*), like Jenkins and Keymis, depends on the circumstance, that the father and son had each an interest in the estate, and one could not make the settlement without the other. Lord Macclesfield, however, considered the marriage portion not to go beyond the limitations to the husband, and wife, and issue; and his subsequent observations are addressed to creditors, and not to *purchasers*. The case of Roe and Mitton (*n*) depends on the same principle, and is so far an authority against the validity of the remainders, that the marriage consideration, alone, was not considered sufficient to support the limitations to the brothers. Lord Eldon has observed (*o*), that in the case of a father, tenant for life, with

(*g*) *Vide infra*, and 18 Ves. jun. 92.
(*h*) See 1 Cha. Ca. 103.
(*i*) See 1 Lev. 237.
(*k*) See 1 Cha. Ca. 105.
(*l*) 2 Lev. 105. See 2 P. Wms. 255.
(*m*) 2 P. Wms. 245.
(*n*) 2 Wils. 356.
(*o*) 18 Ves. jun. 92.

remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son: and the question would be, whether they, *though not within the consideration of the marriage*, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, "I will not agree unless you will so settle." The Court, his Lordship added, has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration. The case of Goring *v.* Nash (*p*), does not apply to the case under consideration. It was a question upon the specific execution of articles, and the rule of equity cannot weaken the effect of the statute.

This hasty view of the authorities seems to show, that the question was still open. A case lately occurred which seemed to call for a clear decision upon the point (*q*). A man, previously to his marriage, settled an estate to the use of himself, for life; remainder to trustees, in the usual way, to preserve; remainder to the first and other sons of the marriage, successively in tail male; remainder to the first and other sons of the husband by any after-taken wife, successively in tail male; remainder to the daughters of the intended marriage, as tenants in common in tail, with cross remainders between them in tail, with reversion to himself in fee. The marriage took effect, and the wife died in her husband's life-time, without issue. The husband, not having been married again, mortgaged the estate. The legal estate was outstanding, and the question was, whether it was to be conveyed to the mortgagee or not. A case was directed to the King's Bench, in which the settlement was stated as a legal set-

(*p*) 3 Atk. 186.

(*q*) Clayton *v.* Lord Wilton, before Lord Eldon, Ch.

tlement: and it was stated, that the settler had sold for a full and valuable consideration. The question for the opinion of the Court was, whether the conveyance to the purchaser was a good and valid conveyance for a valuable consideration, against the issue of the plaintiff's second marriage. Lord Ellenborough, and the other Judges of B. R. (*r*), certified their opinion, that the conveyance, by the plaintiff, to the purchaser, was *not* a good and valid conveyance against the issue of the plaintiff's second marriage.

In the above case, therefore, the limitations to the collaterals were supported: but it is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainders. It has, on the same principle, been considered, that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration.

The same circumstances precisely, however, appear to have occurred in Roe *v.* Mitton, but this ground does not appear to have been urged in its support. It was decided upon the ground before mentioned: and Lord C. J. Wilmot said, that the whole of the question turned upon that. It is scarcely possible to suppose that the question was not discussed at the bar.

In a recent case in Ireland (*s*), the precise point seems to arise, although the facts are very numerous. In a settlement, previous to marriage, after the limitations to the issue of the marriage, which failed, remainders to the collateral relations of the settler were added, under which the grandson of an *uncle* of the settler claimed. The

(*r*) On the 31st May 1813.

(*s*) Fairfield *v.* Birch. The special verdict is shortly stated in Appendix, No. 25.

settler sold the estate to a purchaser, with full notice of the settlement. Upon a trial in the Court of Common Pleas, in Ireland, Lord Norbury, C. J. and Mr. Justice Mayne, were in favour of the defendant; and Mr. Justice Fox, and Mr. Justice Fletcher, in favour of the plaintiff. The latter, *pro forma*, allowed his opinion to be entered up for the defendant, and a writ of error was accordingly brought; but the author has not learned how the point was finally decided.

Since the above observations were written, the case of Johnson *v.* Legard has occurred, in which the abstract point was stated for the opinion of the Court of King's Bench. In that case, the wife had only a rent-charge, and therefore it might be supposed, that she stipulated for the settlement of the estate in remainder, on her husband's brothers, in order that the family dignity might be maintained, and her annuity be regularly paid. The Court of King's Bench certified their opinion, that none of the limitations to the collaterals was a good and valid limitation, as against the purchaser; and the Vice-Chancellor, without hearing any argument on this point, confirmed the certificate (*t*). That decree, however, has upon the circumstances been reversed by the Lord Chancellor on appeal, but still the point in question was not settled (*u*).

If an agreement be entered into before the marriage for a settlement of the estate (*v*), or the husband receive an additional portion with his wife (*w*), the settlement,

(*t*) Ch. 20, July 1818, MS.; 3 Madd. 283; 6 Madd. 60; *vide infra*.

(*u*) 1 Turn. & Russ. 281.

(*v*) Griffin *v.* Stanhope, Cro. Jac. 454; Sir Ralph Bovie's case, 1 Ventr. 193; but *qu.* where the agreement before the marriage is by parol. See Randall *v.* Morgan, 12 Ves. jun. 74; Battersbee *v.* Farrington, 1 Swanst. 106; 1 Wils. 88; and see Treat. of Powers, 4th edit. p. 424.

(*w*) Colvile *v.* Parker, Cro. Jac. 158; Jones *v.* Marsh, For. 64; Stileman *v.* Ashdown, 2 Atk. 477; Ramsden *v.* Hylton, 2 Ves. 304.

although made after marriage, will be deemed valuable. So, even an agreement to pay the husband a sum of money as a portion, will support a settlement made after marriage, if the money is paid according to the agreement (*x*). And where a woman has been married indiscreetly, and a trustee of a sum of money which the husband is entitled to in right of his wife, will not pay it unless he make a settlement on his wife, and a settlement is accordingly made, the settlement will equally be supported as if a bill had been brought against the husband to make a provision for his wife (*y*).

So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although much more valuable than the former (*z*). And the better opinion, as well upon principle as in point of authority, seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her (*a*). It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her.

But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favour of subsequent purchasers will restrain her

(*x*) Brown *v.* Jones, 1 Atk. 188.

(*y*) *Ibid.*

(*z*) Scott *v.* Bell, 2 Lev. 70; Ball *v.* Bumford, Prec. Cha. 113; 1 Eq. Ca. Abr. 354, pl. 5. See Clerk *v.* Nettleship, 2 Lev. 148.

(*a*) Lavender *v.* Blackstone, 2 Lev. 146. See and consider Evelyn *v.* Templar, 2 Bro. C. C. 148; 18 Ves. jun. 91; Pulvertoft *v.* Pulvertoft, 18 Ves. 84.

to her dower (*b*). These are points, however, which will not frequently arise, now that dower is placed under the husband's control (*c*).

If, upon a separation, the husband settle an estate upon his wife, and a friend of her's covenant to indemnify the husband against any debts which she may contract, this will be a sufficient consideration to uphold a settlement as valuable, and not within the statute (*d*). Indeed, the Courts will anxiously endeavour to support a fair settlement, and nearly any consideration will be sufficient for that purpose. Therefore, if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with any thing (*e*).

It may be observed, that the statute of Elizabeth does not affect settlements of personal estate (*f*). Equity will not assist a mere stranger in making good a voluntary settlement upon him, unless the property was so transferred as to create the relation of trustee and *cestui que trust*. In a late case, however, a voluntary assignment of an equitable reversionary interest to trustees, for a stranger, was established, although as the settlement was merely equitable, the person claiming under it of course had not any right to the property at law (*g*). This deci-

(*b*) Dolin *v.* Coltman, 1 Vern. 294.

(*c*) 3 & 4 Will. 4, c. 105.

(*d*) Stephens *v.* Olive, 2 Bro. C. C. 90; King *v.* Brewer, *ibid.* 93, n. See however Lord Eldon's argument in Lord St. John *v.* Lady St. John, 11 Ves. jun. 526; Worrall *v.* Jacob, 3 Mer. 256.

(*e*) Roe *v.* Mitton, 2 Wils. 356. See Myddleton *v.* Lord Kenyon, 2 Ves. jun. 391; Hill *v.* Bishop of Exeter, 2 Taunt. 69; and 18 Ves. jun. 92; Gully *v.* Bishop of Exeter, 5 Bingh. 171; 2 Moo. & P. 105, 266, 276.

(*f*) *Per* Sir W. Grant, in the case of Sloane *v.* Cadogan, *infra*; Jones *v.* Croucher, 1 Sim. & Stu. 315.

(*g*) Sloane *v.* Cadogan, Rolls, Dec. 1808, MS. Appendix, No. 26. This case involved an important question upon the execution of a power. See *ex parte* Pye, 18 Ves. 140; Fenner *v.* Taylor, 2 Russ. & Myl. 195.

sion is of great importance. The principle upon which it was decided should be applied with great caution to other cases.

III. We have seen what will be deemed a fraudulent or voluntary conveyance; but although a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser (*i. e.* would become void by a person purchasing the estate), yet it may become good by matter *ex post facto*: as if a man make a feoffment by covin, or without any valuable consideration, and the feoffee make a feoffment for valuable consideration, and then the first feoffor enter and make a feoffment for valuable consideration, the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of the first feoffee was in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last (*h*).

Lord Eldon has applied this rule to persons having only equitable rights. For where a person who had an absolute power of appointment over a sum of money to be raised under a trust-term, directed part of it to be raised in favour of a volunteer, who afterwards mortgaged such part, although the money appointed was deemed assets as between the creditors of the appointor and the appointee, yet the claim of the purchaser was preferred to that of the creditors: he having a preferable equity (*i*).

If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of

(*h*) Prodgers *v.* Langham, 1 Sid. 133; Andrew Newport's case, Skin. 423; Wilson *v.* Wormal, Godb. 161, pl. 226; Doe *v.* Martyr, 1 New Rep. 332; and see Parr *v.* Eliason, 1 East, 92. See also Lady Burg's case, Mo. 602; and 3 Atk. 377.

(*i*) George *v.* Milbank, 9 Ves. jun. 190. See 1 Mer. 638.

such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration (*j*).

And it is to be inferred from a late decision (*k*), that though it does not appear, that the friends of the wife did speculate upon the provision, and take it into consideration, yet it must be presumed that they did act upon it; and it cannot afterwards be disturbed. In the case alluded to, the question was, whether the husband, who was tenant for life, with remainder to his sons in strict settlement, had any equity to be relieved against the settlement, as made under an undue influence of parental authority; and it was determined, that the husband could not disturb it by reason of his subsequent marriage, although it did not appear that the friends of his wife took the settlement into consideration. The same principle applies to the case under consideration.

Notwithstanding the decisions as to voluntary settlements, it is seldom that a purchaser can be advised to accept a title where there is a prior settlement; for although apparently voluntary, yet if a valuable consideration were paid or given, parol evidence would be admissible of the transaction, in order to support the deed, and rebut the supposed fraud. This seems to be admitted by all the cases (*l*). And in Ferrars *v.* Cherry (*m*), it was even holden, that although a settlement was apparently voluntary, and made after marriage, yet if the purchaser

(*j*) Prodgers *v.* Langham, 1 Sid. 133; Kirk *v.* Clark, Prec. Cha. 275; S. C. by the name of Heisier *v.* Clark, 2 Eq. Ca. Abr. 46, pl. 13; Doe *v.* Routledge, Cowp. 705; East India Company *v.* Clavell, Gilb. Eq. Rep. 37; Prec. Cha. 377; and see 9 Ves. jun. 193; O'Gorman *v.* Comyn, 2 Scho. & Lef. 147; Crofton *v.* Ormsby, *ibid.* 583.

(*k*) Brown *v.* Carter, 5 Ves. jun. 862.

(*l*) See particularly Chapman *v.* Emery, Cowp. 278.

(*m*) 2 Vern. 384.

had notice of the settlement, and it prove to have been made in pursuance of articles before marriage, he would be bound by it, and could not protect himself by a prior legal estate, as he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage. Lord Hardwicke, indeed, has said, that he inclined to think it was in this case left uncertain on the face of the settlement, whether it was made before marriage or not; and he denied the authority of the case (*n*).

This opinion of Lord Hardwicke's cannot be safely relied on. Indeed, if notice of a settlement apparently voluntary, but which turns out to be made on valuable consideration, should not be deemed notice to a purchaser of the consideration, yet, unless he has a prior legal estate, he cannot protect himself against the settlement. Both parties being purchasers, equity must stand neuter, and the person claiming under the conveyance must recover at law.

There are but few cases on the effect of an *agreement* by the settler to sell an estate after a voluntary settlement of it. In Leach *v.* Dean (*o*), the plaintiff's suit was to be relieved upon articles of agreement for the purchase of lands from the defendant, who before the articles had by deed conveyed the estate to his son, and the Court made the decree as prayed; "but as to the voluntary conveyance, the same is not hereby impeached, as between the father and son for any advancement, or any other thing thereby settled on the son, other than making good the articles of agreement; but the trustees to be paid their debts and engagements out of the purchase-money." It does not appear that the purchaser had notice of the set-

(*n*) Senhouse *v.* Earle, Ambl. 285. See 2 Ves. 60, n.

(*o*) 1 Cha. Rep. 78.

tlement at the time he contracted. It was altogether a voluntary settlement. So in Douglasse *v.* Ward (*p*), the settlement was after the settler's first marriage on himself for life, remainder to his first and other sons in tail, and was therefore voluntary throughout. Previously to his second marriage, in consideration of a portion, he agreed to settle a jointure on his second wife, out of the settled estate, and she was relieved against her own issue, who claimed under the settlement. It does not appear that she had notice of the settlement, and at the time of her articles there was no person *in esse* entitled under the settlement, and the settler himself could have destroyed the contingent remainders. Parry *v.* Carwarden (*q*), was also a suit by a purchaser, who had no notice of the settlement, and there the settler herself filed a bill to set aside the settlement, but died before the cause was at issue.

The cases, therefore, do not carry the doctrine very far. They were all cases in which the *purchaser* was plaintiff, and in none of them had he notice of the settlement. It is now settled, after a great struggle, that a purchaser under a *conveyance* may avoid a voluntary settlement, although he had notice of it, but that decision ought not to induce *equity* to consider Leach *v.* Dean, and that line of cases, as authorities for decreeing a specific performance where the purchaser has notice. If a construction of a statute be made, which it is too late to overrule, but which, it is admitted, ought never to have been established, the principle of the rule should not be pushed to its greatest extent, but the rule should rather be confined strictly to the very circumstances under which it was established.

In Bennet *v.* Musgrove (*r*), Lord Hardwicke said, the distinction in equity was, that where a subsequent pur-

(*p*) 1 Cha. Ca. 99. (*q*) Dick. 544. (*r*) 2 Ves. 51.

chaser for a valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made, without actual fraud, the Court will say, Take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this Court to set aside that conveyance; which is a distinction between actual and presumed fraud, from its being merely a conveyance; and he adhered to the same rule in Oxley *v.* Lee (*s*).

From this it might be inferred, that equity would not compel a specific performance in favour of a purchaser who bought *with notice* of a prior voluntary conveyance made without fraud. But in a recent case, where, after a voluntary settlement, the settler entered into a contract to sell the settled estate to a person with full notice of the settlement, Sir Wm. Grant, Master of the Rolls, on mature consideration, decreed a specific performance against the parties claiming under the voluntary settlement (*t*); and Lord Eldon appears to have approved of the decision (*u*), but he was not called upon to consider the point. It is certainly a very strong decision. The construction that a *bonâ fide* voluntary settlement was void under the statute against a subsequent purchaser, who bought with notice, was not established without great opposition, and has always been considered a harsh interpretation. But the statute only operates where the purchaser acquires the estate under a conveyance. Equity generally follows the law; and therefore a sale of an equitable estate must, like a sale of a legal estate, operate to defeat a prior voluntary settlement; but that rule does

(*s*) 1 Atk. 625.

(*t*) Buckle *v.* Mitchell, 18 Ves. jun. 101.

(*u*) Metcalfe *v.* Pulvertoft, 1 Ves. & Beam. 180.

not seem to apply to this case, where the contracting party has all his legal right, and the question is not in what channel an equitable interest actually *in esse* shall go, but whether the purchaser has any equitable interest, or, in other words, whether the Court will lend him its extraordinary aid, in order to carry the contract into a specific execution, instead of leaving him to his remedy at law. It were difficult to maintain, that the statute requires, by implication, equity to interpose, or that the interposition of the Court is called for by analogy to the legal rule; and unless that could be established, the plaintiff in such a suit might, with propriety, be told that he did not come there with clean hands. He knew that the seller had already settled the estate on another, and that he could not break through the settlement unless by the circuitous route of a sale. This was a purpose to which the plaintiff ought not to have lent himself, and at least he could not complain that he was left to his legal right, and that equity, who would not suffer the settler to break through the settlement for his own benefit, would not assist even a purchaser in defeating it where he bought with notice. The act relieves a man who has actually bought and paid for the estate, and obtained a conveyance of it; but it does not provide for the case, where not having completed his contract, he would not be damnified by the settlement; but would have his legal remedy against the vendor for breach of contract. Such a case did not call for any legislative remedy, and equity, it may be thought, ought to stand neuter.

In Buckle *v.* Mitchell, however, the settlement was subject to all the specialty and simple contract debts then due, *or to be due*, from the settler. The bill was filed after the seller's death, but that circumstance does not appear to have received much consideration.

In the case of Burke *v.* Dawson (*x*), Sir Wm. Grant, I am told, seemed to be of opinion, that although a *purchaser*, subsequently to a voluntary conveyance, might compel a specific performance, yet the *vendor* could not enforce the execution of the contract against an unwilling contractor. Indeed this seems to flow from the rule, that the voluntary conveyance is binding on the settler himself; and the statute of Elizabeth was passed to protect purchasers, and not to enable persons to break through *bonâ fide* settlements, although made voluntarily, and without consideration.

In the later case of Smith and Garland (*y*) the very point arose. The bill was filed by the seller, who made the voluntary settlement. The defendant, the purchaser, bought without notice. He raised the objection to the title on account of the settlement by his answer, but submitted to perform the contract if a good title could be made. Sir Wm. Grant, Master of the Rolls, in a judgment which will long be remembered by those who heard it, expressly distinguished the case from his former decision in Buckle and Mitchell, and decided that the settler cannot maintain a bill for a specific performance. For the settlement was binding on him, and he had no right to disturb it.

In the more recent case of Johnson *v.* Legard, the settlement was in consideration of a marriage, and was not voluntary throughout. By an agreement in writing, in October 1807, Sir John Legard, the settler, agreed to sell and convey the estate to Mr. Watt, before the 6th of April 1808. And Mr. Watt agreed to secure, by mortgage of the estate and his bond, the purchase-money with interest; which principal sum was to remain upon the security at interest during the life of Sir John Legard, and for twelve

(*x*) Rolls, March 1805, MS. (*y*) Smith *v.* Garland, 2 Mer. 123.

calendar months afterwards. And it was agreed, that if Watt, his heirs or assigns, should be evicted from or deprived of the possession of the estate by any issue male of Sir John Legard, *or by any other person claiming or deriving title under him*, then the sums laid out in improvements or necessary alterations were to be repaid with interest, and also the purchase-money; and the security for any part unpaid was to be void. Sir John Legard died. His creditors filed a bill against the remainder-men under the settlement, and against Watt, praying a specific performance. Watt by his answer objected to the title on account of the settlement, but submitted to perform the agreement on having a good title. By the decree it was ordered, that a case should be made for the opinion of the Judges of the King's Bench, and that such case should state, that a conveyance was actually made of the estate in question for a valuable consideration, by Sir John Legard, in his lifetime; and that the question should be, whether the limitations to the collaterals were good against the purchaser; and further directions were reserved. The result of the case before the King's Bench has already been stated. The cause came on before Sir John Leach, Vice-Chancellor, on further directions (*z*). The counsel for the remainder-men relied upon the case of Smith *v.* Garland, which had been decided since the case was directed to the King's Bench. The Vice-Chancellor held that that case was not an authority to be followed. It was however, argued, 1. That the statute of Elizabeth only applied to purchasers under actual conveyances, and that equity ought not to interfere. It never could be contended, that at law a purchaser having a mere right of action under a contract, and not having paid his purchase-money, could avoid a voluntary settlement, and it would be difficult to draw any line.

(*z*) 17 July 1818, MS.; 3 Madd. 283, a short note; Sutton *v.* Chetwynd, 3 Mer. 249.

2. That the agreement was a mere trick to set aside the settlement, without placing the purchaser in any danger. He never stood in the situation of a purchaser who could be deceived; and the second point in White *v.* Stringer was strongly relied upon (*a*). 3. That the creditors had not any right to file a bill. The settlement was binding on the settler, and unless he placed a purchaser in a situation to avoid the settlement, the estate of the remainder-men could not be impeached after his death: there was no equity against them. 4. That Smith and Garland was a great authority, and a stronger case than that before the Court. There, as well as in this case, the purchaser submitted to perform the contract if a good title could be made. The Vice-Chancellor expressed an opinion that the creditors might file a bill although the settler could not, as there was a moral obligation on him to provide for his debts, and that the Court could make a decree between the co-defendants. For the remainder-men it was insisted, that the settler having solemnly on his marriage settled the estate, in default of his own issue, on the person who would succeed to his title, had already performed a moral obligation, and exhausted his power over the estate. The settlement was binding on him, and his creditors could not, claiming under him, have any rights to which he was not entitled. They did not attempt to impeach the settlement under the 13 Eliz. It was also submitted, that it would be an act of injustice to extend the rule as to decreeing relief between co-defendants to this case, because it at once took the estate from the remainder-men without any consideration. It did not follow that Watt the purchaser would file a bill; and if he did, the co-defendants might shape their defence in a way which they had not by the present bill been called upon to do. The Vice-Chancellor held, that the statute of 27

(*a*) 2 Lev. 105.

Elizabeth did not confine the relief to a purchaser *by conveyance*, but the act supposed there may be a purchaser *by contract*. The purchaser's right follows as against the representatives of the vendor. His Honor thought that the creditors would have a right to insist upon a specific performance, though the vendor had not; but that point did not arise, for Mr. Watt says he is ready to take the estate if a good title can be made. Besides, the former decree concluded every question now raised. The defendants, the remainder-men, have appealed to the Lord Chancellor against this decision. Subsequently to the publication of the above observation, the appeal was heard and the decree below reversed (*b*).

In Cormick *v.* Trapaud (*c*), the settler was tenant in tail, with remainders to his brothers in tail, he agreed to settle the estate previously to his marriage, but did not extend the limitations to his brothers; he after marriage settled the estate with remainders to his brothers for life, and their issue in strict settlement, and afterwards suffered a recovery. It was held that the limitations to the brothers were voluntary limitations, although the settler was only tenant in tail.

If a trust be created by a voluntary settlement, the parties entitled under it may file a bill to have the trust carried into execution; but an injunction will not be granted restraining the settler from defeating the settlement by a sale (*d*); nor will the pendency of the suit prevent the settler from selling the property, or the purchaser from filing a bill in order to enforce his rights under the contract (*e*).

(*b*) It is now reported, 1 Turn. & Russ. 281.

(*c*) 6 Dow, 60.

(*d*) Pulvertoft *v.* Pulvertoft, 18 Ves. 84.

(*e*) Metcalfe *v.* Pulvertoft, 1 Ves. & Bea. 180. The widow pleaded *lis pendens*, and the plea was overruled by the Vice-Chancellor on the 10th August 1813. See 2 Ves. & Bea. 200.

IV. It remains to consider the construction which the part of the statute relating to conveyances with power of revocation has received. And first it is to be observed, that the statute does not extend to particular powers, as a power to charge 2,000 *l.* on an estate of considerable value, for such a power is not a power within the words of the statute (being for a particular sum) to revoke, determine, or alter the estate (*f*).

But it is of course quite clear, that a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser (*g*), and no artifice of the parties can protect the settlement. Therefore, although the power is conditional, that the settler shall only revoke on payment of a trifling sum to a third person (*h*), or with the consent of any third person who is merely appointed by the grantor (*i*), in these and the like cases the condition will be deemed colourable, and the settlement will be void against a subsequent purchaser.

But if a settlement is made with a power to the settler to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates (*k*), or to revoke with the consent of a stranger *bonâ fide* appointed by the parties, and his consent is made requisite, not as a mere colour, but for the benefit of all parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser (*l*). This was determined in the case of Buller *v.* Waterhouse (*m*), which, however, Mr. Powell thought, did not settle the point, *because all the claimants under*

(*f*) Jenkins *v.* Keymis, 1 Lev. 150.

(*g*) Cross *v.* Faustenditch, Cro. Jac. 180; Tarback *v.* Marbury, 2 Vern. 510. See Lane, 22.

(*h*) Griffin *v.* Stanhope, Cro. Jac. 454.

(*i*) See 3 Rep. 82, b.; Lavender *v.* Blackston, 3 Keb. 526.

(*k*) Doe *v.* Martin, 4 Term Rep. 39.

(*l*) See Leigh *v.* Winter, 1 Jo. 411; and see Lane, 22.

(*m*) 2 Jo. 94; 3 Keb. 751; and see acc. Hungerford *v.* Earle, 2 Freem. 120; Lane, 22.

the conveyance were purchasers for a valuable consideration (*n*). But it seems quite immaterial whether the settlement itself is merely voluntary, or upon valuable consideration (*o*). The statute says, that all conveyances which the grantor has power to revoke shall be void against subsequent purchasers; and therefore, if parties giving a valuable consideration for a settlement choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of the power, *may* revoke the settlement; and if he sell the estate without revoking it, the statute makes it void. In fact, if we hold, that settlements made upon valuable consideration are not within this provision, we must at the same time admit, that the Legislature did not intend to affect voluntary settlements, unless they were actually fraudulent; for voluntary settlements are void against purchasers under the second section of the act, which has already been discussed. This clause therefore would, under the construction put upon it by Mr. Powell, have scarcely any operation.

If a man having a power at a future day to revoke a settlement made by him, sell the estate before the day arrive, the settlement will be void against the purchaser at the time when the vendor, according to the terms of the power, *might* have revoked the settlement (*p*).

And a settlement made with power of revocation, will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale; otherwise the vendor might secretly release or destroy the power, and then show to the purchaser the conveyance containing the power of revocation, and so induce him to buy the land (*q*). In the case, however, in which this was decided, the settlement appears to have

(*n*) Pow. on Powers, 330.

(*o*) See acct. Rob. on Vol. Conv. 637.

(*p*) Mo. 618; 3 Rep. 82 b; Bridg. 23.

(*q*) Bullock *v.* Thorne, Mo. 615.

been voluntary, and the purchaser had not notice of the power being destroyed. But if a settlement should be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, it is conceived that a purchaser, subsequently to the destruction of the power, could not prevail over the settlement.

The statute, as we have seen, operates conditionally, that is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate without revoking the first conveyance by virtue of his power. Suppose, then, a vendor professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The Legislature intended to protect purchasers against fraudulent settlements, with powers of revocation, for it is essential, to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the power reserved to the grantor by such *secret* conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to operate were presumed to be *secret.* It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. *The statute was not intended to operate as a mode of conveyance.* But without insisting that where a purchaser is aware of the settlement, he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he rejects the aid of the Legislature, and takes his title *under* and *not in opposition to* the settlement; and can, therefore, only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal

title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.

SECTION II.

Of Protection from Charitable Uses.

In the statute of charitable uses (*r*) is a proviso, that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of or in any lands, &c. that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin (*having no notice of the same charitable uses*), shall be impeached by any decrees of the commissioners therein mentioned.

A purchaser who hath bought for an inadequate consideration is not within this proviso; and the adequacy of the consideration is measured according to the rule of the civil law; but if one purchase lands under half the value, and sell to another upon good consideration *bonâ fide*, the fraud is purged (*s*).

If a rent-charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration to one who has no notice, it has been said the rent remains; because the purchase was of another thing that was not given to the charitable use (*t*): but in Tothil (*u*), the same case is referred to as an authority, that a purchaser coming in without notice of a rent-charge shall not be chargeable therewith, although given to a charitable use. The correct distinction seems to be,

(*r*) 43 Eliz. c. 4.

(*s*) *Vide supra*, Vol. 1, p. 272; Duke, 177.

(*t*) East Greenstead's case, Duke, 64; and see Peacock *v.* Thewer, Duke, 82.

(*u*) Toth. 226.

that where the rent-charge is legal, it must, like every other *legal* incumbrance, bind the purchaser, although he purchased without notice; but that where it is a mere equitable charge, the commissioners shall not make any decree for payment of it against the purchaser, if he purchased without notice.

If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under his estate and title, whether they have notice or not, will be bound by the decrees of the commissioners (*x*).

This rule, as we shall hereafter see, differs from the general rule of equity in this respect—a subsequent purchaser without notice not being affected by notice in the person of whom he purchased.

With this exception, however, the same rules seem to prevail in the construction of the act, with respect to notice, as are generally adopted by equity (*y*).

SECTION III.

Of Protection from Acts of Bankruptcy.

I. By the statute 13 Eliz. c. 7, a purchaser would be defeated, although there should be forty years after an act of bankruptcy, and before a commission; and although the purchaser had no notice; for the words of the statute are general *after bankruptcy*, and the proviso in the end of the statute makes it still plainer, viz.: *That assurances made by a bankrupt before bankruptcy, and* bonâ fide, *shall not be defeated.*—This was hard doctrine against fair purchasers without notice; but so the law was (*z*).

With a view to prevent this injustice, and at the same time to preserve to creditors their just rights, and perhaps

(*x*) East Greenstead's case, Duke, 64; and see *ibid.* 173.

(*y*) *Ibid.*

(*z*) See For. 66, 67.

in analogy to the statute of fines, it was by the 21 Jac. 1, c. 19, s. 14, enacted, that no purchase for good and valuable consideration should be impeached by virtue of that act, or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt should be sued forth against such bankrupt within five years after he should become a bankrupt.

But even after this provision it was dangerous to purchase an estate from a trader; for an act of bankruptcy might have been committed within five years before, which would reach the estate (*a*).

It has been decided, that if a purchaser have notice of the act of bankruptcy, he is not a purchaser within the meaning of the statute, and consequently is not entitled to the benefit of it (*b*): but if the act of bankruptcy arise by the execution of a fraudulent deed, notice of the deed, without notice of the fraud, will not be deemed notice of the bankruptcy (*c*). This is a point which frequently occurs in practice; a deed appears upon an abstract, by which the owner, being subject to the bankrupt laws, conveys all his estate for the benefit of his creditors, and to which *all* the creditors are stated to be parties (*d*). Now, *supposing the title to be so circumstanced, that the purchaser could not be affected by an act of bankruptcy, unless he had notice of it*, the question at once arises, whether notice of the deed is notice of any creditor not having executed it, in which case the deed would be fraudulent, and an act of bankruptcy. This is a very important question, as it is impossible to give evidence of *all* the creditors having executed. But it seems to follow from the decision in Read *v.* Ward, that the purchaser

(*a*) See 4 Ves. jun. 398.

(*b*) Read *v.* Ward, 2 Eq. Ca. Abr. 119; 7 Vin. Abr. 119; Mountford *v.* Ponten, 1 Mont. 79.

(*c*) S. C.

(*d*) See now 6 Geo. 4, ch. 16, s. 4, *post*.

would not be held to have had notice that *all* the creditors were not parties to the deed; and this opinion appears to be adopted in practice.

To avoid a purchase, the act of bankruptcy must be committed within five years before the commission (*e*). The five years are, however, computed from the last act of bankruptcy preceding the sale; for the words of the statute are not after he shall first be a bankrupt, but only after becoming bankrupt generally (*f*); and, therefore, if after several acts of bankruptcy an estate is sold by the bankrupt, and a commission issues within five years from the last act, the sale will be avoided (*g*). But no act of bankruptcy *after* the sale will affect the purchaser; and consequently his title will not be impeached by any commission issued after five years from the act of bankruptcy immediately preceding the sale (*h*).

II. Thus the law stood until Romilly's act for amending the laws relating to bankrupts (*i*), by which, after reciting that great inconveniences and injustice had been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by *secret* acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it was enacted, that in all cases of commissions *thereafter* to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt *bonâ fide* made or entered into more than two calendar months before the date of such commission,

(*e*) Radford *v.* Bloodworth, 1 Lev. 13.

(*f*) Spencer *v.* Venacre, 1 Keb. 722; 1 Lev. 14.

(*g*) Jelliff *v.* Horn, 1 Keb. 12, cited; Radford *v.* Bloodworth, 1 Lev. 13; 1 Keb. 11.

(*h*) Spencer *v.* Venacre, 1 Keb. 722; and see Cullen's B. L. 241.

(*i*) 46 Geo. 3, c. 135, extended to executions and attachments by 49 Geo. 3, c. 121, s. 2.

should, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not at the time of such conveyance, payment, contract, dealing or transaction, any notice of any *prior* act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment. And it is provided, that the issuing of a commission of bankruptcy against such bankrupt, although such commission shall afterwards be superseded, or the striking of a docket for the purpose of issuing a commission against such bankrupt, whether any commission shall have actually issued thereupon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of the act; if it shall appear that an act of bankruptcy had been actually committed at the time of the issuing such commission, or striking such docket.

The better opinion appears to be, that neither an act of bankruptcy, nor a commission of bankruptcy, is of itself notice to a purchaser; and that notwithstanding the statute of James, a purchaser who has got in a prior legal estate without notice of a commission or act of bankruptcy, may protect himself against it (*k*). But under Romilly's act, a purchaser cannot avail himself of a prior legal estate if a commission was actually issued, or a docket struck previously to his purchase, although he had not actual notice of the issuing of the commission or striking of the docket, because the statute expressly makes those acts constructive notice.

It should seem, however, that the provision in the statute of James, in favour of purchasers, is not repealed by the late act. If it be not, then a purchaser will not

(*k*) See this considered, *infra*, Ch. 17.

be bound by the constructive notice established by the late act, where he does not claim the benefit of it. Thus, if it should appear that a commission had been issued or a docket struck prior to the purchase, the purchaser could not claim the benefit of the late act, although he had not actual notice of the commission or docket; but if more than five years had elapsed since the purchase, and a new commission were then to issue, it should seem that he may insist upon the benefit of the act of James. So where a purchaser *bonâ fide*, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favour of purchasers; that it does not say *affirmatively*, that a commission issued two months after a conveyance *shall* bind where a commission has been issued, or a docket struck prior to the purchase, but merely enacts *negatively*, that a commission issued after that time *shall not* bind, unless a commission was issued or a docket struck before the purchase.

The express enactment, that the striking a docket or issuing a commission shall operate as a constructive notice to purchasers, seems to exclude all other kinds of constructive notice, so far as any aid is sought from this statute: the Legislature having expressly declared that these two particular acts shall be deemed constructive notice, it must be inferred that they intended no other act should have that effect. Therefore there is ground to contend, that if a commission has not been issued or a docket struck, a purchaser may avail himself of the statute, although, for instance, his solicitor had express notice that the vendor had committed an act of bankruptcy. Against this construction, it might, perhaps, be argued, that as neither the striking of a docket, nor the issuing of a commission, was prior to the statute of itself

notice to a purchaser, the intention must have been to make those acts constructive notice, in addition to the acts which equity already deemed tantamount to actual notice. Cases of actual notice will entirely deprive the purchaser of the benefit of the act.

The provision which makes the striking of a docket notice, in all events, was not approved of (*l*). It was not originally in the act, and has since been repealed (*m*).

It is, as we have seen, also provided, that to claim the benefit of the act, the purchaser must not have notice that the bankrupt was insolvent, *or* had stopped payment. If it should be thought that insolvency and stopping payment do not mean the same thing, considerable difficulty must frequently arise on this provision. Insolvency of itself appears to include not merely a stoppage of payment, but an *inability* to pay; unless, however, the evidence of insolvency be confined to an actual stoppage, it would not be easy to say what shall be deemed notice of it.

Since the above observations were written, it has been decided, that the insolvency mentioned in the statute, means *a general inability* in the bankrupt to answer his engagements (*n*).

In a late case (*o*), Mr. Justice Le Blanc said, that he took insolvency, as it respects a trader, to mean that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs; and Mr. Justice Bayley agreed, that insolvency means that a trader is not able to keep his general

(*l*) Rex *v.* Bullock, 1 Taunt. 71; 14 Ves. jun. 452.

(*m*) 49 Geo. 3, c. 121.

(*n*) Anon. 1 Camp. Ca. 491, n. See Abraham *v.* George, 11 Price, 423; Spratt *v.* Hobhouse, 4 Bing. 173; 12 Moo. 395, S. C.

(*o*) Bayly *v.* Schofield, 1 Mau. & Selw. 338.

days of payment, and that he is not to be considered as solvent because possibly his affairs may come round.

The provision, that the *issuing* of a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded, without being opened, although it was contended, that the Legislature must have meant a commission opened, and acted upon, though afterwards superseded (*p*).

III. The law has again been altered by the act of the 6th of the late King. The observations already made show how the law stood before that act, which is still necessary to be known, and therefore those observations are retained.

The act referred to contains the following provisions relating to purchasers:

1. By the 81st section (*q*) it is enacted, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against, and all executions and attachments against, the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing or transaction,

(*p*) Watkins *v.* Maund, 3 Camp. Ca. 308.

(*q*) 6 Geo. 4, c. 16; see 1 & 2 Will. 4, c. 56; 3 & 4 Will. 4, c. 47.

or at the time of executing or levying such execution or attachment, notice (*r*) of any prior act of bankruptcy by him committed (*s*); provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing the first commission.

2. And by section 83 it is enacted, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same (*t*).

3. And by s. 85 it is enacted, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice (*u*).

4. And by the 86th section it is enacted, that no purchase from any bankrupt, *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy, by such bankrupt committed, shall be impeached by reason thereof, unless

(*r*) That he was insolvent or had stopped payment omitted.

(*s*) 46 Geo. 3, c. 135, s. 1, and 49 Geo. 3, c. 121, s. 2.

(*t*) See Spratt *v.* Hobhouse, 4 Bing. 173; 12 Moo. 395, S. C.

(*u*) *Ibid.*

the commission against such bankrupt shall have been sued out within twelve calendar months (*v*) after such act of bankruptcy (*w*).

5. And by the 87th section it is enacted, that no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof. But this provision does not protect a purchaser against the claim of an assignee under a subsequent commission, after the first commission under which he purchased has been superseded (*x*).

6. And it is enacted by section 4, that where any trader within the act, shall, after the act shall have come into effect, execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof,

(*v*) Instead of five years.
(*w*) 21 Jac. 1, c. 19, s. 14.
(*x*) Gould *v.* Shoyer, 6 Bing. 738; 4 Moo. & P. 635, S. C.

in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence, and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

SECTION IV.

Of Protection from Judgments and Recognizances.

I. By a fiction in law, all judgments were supposed to be judgments of the first day of the term in which they were obtained; and therefore a purchaser might have his estate incumbered by a judgment acknowledged subsequently to his purchase (*y*).

To obviate this injustice, it was enacted (*z*), that any judge or officer of any of His Majesty's Courts of Westminster, that should sign any judgments, should, at the signing of the same, set down the day of the month and year of his so doing, upon the paper book, docket or record, which he should sign; which day of the month and year should also be entered on the margin of the roll of the record where the said judgment should be entered, and such judgments, as against purchasers *bonâ fide* for valuable considerations of lands, tenements or heredita-

(*y*) *Vide supra*, Vol. 1, p. 539, as to judgments.
(*z*) 29 Car. 2, c. 3, s. 14, 15.

ments, to be charged thereby, should in consideration of law be judgments only from such time as they should be so signed, and should not relate to the first day of the term whereof they were entered, or the day of the return of the original, or filing the bail. And this provision has been since extended to the Courts of Great Session in Wales, and to the Courts of Session in the counties palatine of Chester, Lancaster and Durham (*a*).

But though this settled all differences respecting the fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchasers *bonâ fide* for a valuable consideration, the lands, tenements and hereditaments to be charged thereby, should be charged only from such time as the judgment was signed; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered (*b*).

And, therefore, by another statute (*c*) it was enacted, that the clerk of the essoigns of the Court of C. B., the clerk of the doggets of the Court of B. R. and the master of the office of pleas in the Court of Exchequer, should make and put into an alphabetical dogget, by the defendants names, of all the judgments entered in their respective Courts of Michaelmas and Hilary terms, before the last day of the ensuing terms; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term; and that no judgments should affect lands or tenements as to *bonâ fide* purchasers for valuable considera-

(*a*) 8 Geo. 1, c. 25, s. 6.

(*b*) Robinson *v.* Harrington, 1 Pow. Mort. 518, 4th edit. S. C. MS.

(*c*) 4 and 5 W. & M. c. 20, made perpetual by 7 and 8 W. 3, c. 36, s. 3.

tion, unless docketed and entered according to the act; and it is directed that every dogget shall be put into and kept in books in parchment, to be searched by all persons, at reasonable times, paying fourpence for searching every term.

"Dockets or indexes to judgments were in use long before this statute. They were invented by the Courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The statute of William and Mary did not supersede the former practice of docketing the judgment in parchment or paper, which is still necessary to be done by the attornies on entering and bringing in the rolls; but was intended to operate in addition to that practice, by requiring the dockets to be entered in alphabetical order by the officers of the Court (*d*)."

Now, upon the provisions of this act it has been observed, that judgments cannot be docketed after the time mentioned in the act; and the practice of the clerks in docketing them after that time is only an abuse for the sake of their fees, and ineffectual to the party (*e*). And as the object of the act is to enable purchasers to discover judgments by the names of the persons against whom they are entered, if the name of a defendant be falsely entered, as Compton for Crompton, the judgment will be void against purchasers, and the Court will not amend the record (*f*).

If it is wished to enter a judgment as of a term, it must be actually entered before the essoign-day of the succeeding term; and Lord C. J. Holt has said, that if judgment be signed in a term, and in the subsequent vacation the

(*d*) Tidd's Pract. 858. 860. 3d edit.; Gilb. C. P. 140.

(*e*) *Per* Master of the Rolls, in Forshall *v.* Coles, Appendix, No. 20, *sed qu.*

(*f*) Sale *v.* Crompton, 1 Wils. 61; 2 Str. 1209.

defendant sells lands, and before the essoigns of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser (*g*). And although this has been doubted (*h*), yet it seems to be correct, as the judgment is not affected by the act of Charles 2, or that of William and Mary. The judgment binds only according to the letter of the statute of Charles; and it is not required to be docketed by the act of William and Mary, till before the last day of the subsequent term. And there is no inconvenience in this rule, for I find, upon inquiry, that the practice is to index judgments as soon as they are signed, in order to enable purchasers to search for them with facility. But this practice is wholly independent of the directions of the act by which judgments are required to be docketed.

Although a judgment is not duly docketed, and therefore void against a purchaser, yet if the purchaser has notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it (*i*).

The general rule of equity would warrant an assertion, that the case would be the same although no agreement were made. In the case of Forshall *v.* Coles (*k*), however, it appears that the Master of the Rolls held decidedly that notice of a judgment not docketed was not material. But this decision cannot be relied on: the effect of it would be to overrule all the decisions on the statutes for registry (*l*). They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and

(*g*) Hodges *v.* Templar, 6 Mod. 191.

(*h*) Tidd's Pract. 857; Bac. Abr. by Gwill. tit. Execution (I) n.

(*i*) Thomas *v.* Pledwell, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684, pl. 7.

(*k*) 7 Vin. Abr. 54, pl. 6; 2 Eq. Ca. Abr. 592, pl. 8; S. C. MS. a better note, Appendix, No. 20.

(*l*) *Vide infra*, sect. 5.

therefore, if a purchaser has notice of any judgment, the statute does not in equity extend to him, as he is already in possession of what the Legislature intended to furnish him with. This point, upon which a considerable difference of opinion recently prevailed in the Profession, has lately been decided by Lord Eldon in favour of the judgment creditor. The case of Forshall *v.* Coles is therefore overruled (*m*).

The statute of 21 Jac. 1 (*n*), for the better division of the estates of bankrupts, enacted, that all creditors by judgment, whereof execution was not served and executed before the bankruptcy, should only come in rateably with the other creditors; and this is carried still farther by the late act (*o*). In general, therefore, judgments against a bankrupt are not material where the estate is sold by his assignees. In a late case (*p*), a man sold a freehold estate, and the conveyance was executed by all the material parties; but no part of the money was paid, and the conveyance remained in the seller's hands. In this stage he became a bankrupt, and a commission issued against him; and it appeared that judgments were entered up against him previous to the bankruptcy. The purchaser required satisfaction to be entered up on the judgments. This was resisted on the ground that, by the statute of James 1, the judgment debts were reduced to a level with the simple contract debts, for the object of that statute was to put all the creditors on an equality (*q*). Now, it was clear that the seller had an equitable lien on the land for its whole value, and that the money would go to the assignees: and, consequently, if the judgment creditors could execute their judgments against the purchaser, they

(*m*) Davis *v.* Earl of Strathmore, 16 Ves. jun. 419.

(*n*) Ch. 19, s. 9.

(*o*) 6 Geo. 4, c. 16, s. 108.

(*p*) Sloper *v.* Fish, Rolls, 29th July 1813; 2 Ves. & Bea. 145.

(*q*) See Newland *v.* ——, 1 P. Wms. 92.

would obtain a preference over the other creditors; for, of course, the purchaser was not to pay his money, and also be liable to the judgments. The case of Orlebar *v.* Fletcher (*r*), appeared to be a stronger case against the judgment creditors than the present, for there the purchaser had paid the greater part of the purchase-money before the bankruptcy; and although, in the present case, the conveyance was executed, yet it was not delivered, and therefore might be considered as an escrow (*s*); and even if it operated to vest the legal estate in the purchaser, yet the case was within the spirit and meaning of the act of James; because the estate in effect formed part of the property to be distributed. Upon these grounds the assignees filed a bill against the purchaser for a specific performance; but the Master of the Rolls thought the title too doubtful to enable him to force it on the purchaser.

In a later case, however (*t*), where a man agreed to sell his estate, and became a bankrupt before the conveyance was executed, the same learned Judge held that the assignees of the seller could make a title without the concurrence of judgment creditors whose judgments were duly docketed before the bankruptcy.

The 21 Jac. 1, c. 24, which enables persons to have new execution against the property of debtors dying in execution, provides, that the act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements or heredita-

(*r*) 1 P. Wms. 737.

(*s*) Derby Canal Company *v.* Wilmot, 8 East, 360. See O'Dell *v.* Wake, 3 Camp. 394, where the deed was in the possession of the purchaser's solicitor.

(*t*) Sharpe *v.* Roahde, 2 Rose, 192.

ments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bonâ fide* for the payment of any of his creditors, and the money which shall be paid for the lands so sold either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof.

II. Formerly, if goods had been sold during long vacation, a *fieri facias* tested the preceding term would have over-reached the sale, although issued subsequently to it (*u*).

To remedy this inconvenience, it was enacted (*x*), that no writ of *fieri facias*, or other writ of execution, should bind the property of *goods* against whom such writ of execution was sued forth, but from the time that such writ should be delivered to the sheriff, under-sheriff or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their deputies and agents, should upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof the day of the month or year whereon he or they received the same (I).

It has been said (*y*), that the whole intention of this provision was to secure purchasers, under a second execution, against any former writ which might have been delivered to the sheriff. But a purchaser under a second execution was always protected against any prior writ of

(*u*) Houghton *v.* Rushley, Skin. 257; and see Comb. 145; 2 Ventr. 218.

(*x*) 29 Car. 2, c. 3, s. 16.

(*y*) *Per* Ashhurst, J. *in casu* Hutchinson *v.* Johnson, 1 Term Rep. 731.

(I) This statute only operates in favour of purchasers. It was not passed for the benefit of the debtor. Houghton *v.* Rushley, *sup.* and Norden *v.* Needham, Pasch. 3 W. & M. B. R. MS. In this last case it was held that deeds and writings could not be taken in execution.

which he had no notice, by the rule of law, independently of the statute of frauds (*z*); and the reason already given appears to be the correct one.

It has been doubted whether the word "goods," in the act referred to, extends to leasehold estates; and it appears by two opinions published in Mr. Rigge's Observations on Registry, that Mr. Serjeant Hill thought it did not include leaseholds, but that they might be extended on a writ of *elegit*; and consequently were bound from the time the judgment was duly entered and docketed; and that, on the other hand, Mr. Butler thought the word "goods" did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution.

It must be admitted, that a leasehold for years may be extended on an *elegit*, if it is in the possession of the defendant at the time execution is awarded (*a*). It was, however, settled long before the statute of Charles 2, that a sale of chattels was good after judgment, although not after execution awarded (*b*); so that as to a term of years the command to the sheriff in an *elegit* does not overreach the sale in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in Fleetwood's case.

With respect to judgments, the statute of frauds hath two branches: the one relating to judgments against real estate; the other relating to executions on judgments against goods or personal estate. The act being a remedial

(*z*) See Smallcomb *v.* Buckingham, 1 Lord Raym. 251; Carth. 419; Payne *v.* Drewe, 4 East, 523.

(*a*) Sir Gerard Fleetwood's case, 8 Co. 171; and see and consider 31 Ass. p. 6; 38 Ass. p. 4; and see 2 Inst. 395; Gilb. Ex. 33. 35.

(*b*) Sir Gerard Fleetwood's case, 8 Co. 171; and see 1 Fitz. Abr. tit. Execution, pl. 108; 2 Ro. Abr. 157; Wilson *v.* Wormol, Godb. 161, pl. 226; Shirley *v.* Watts, 3 Atk. 200.

one, the mode of discovering whether leaseholds are bound by the last provision, seems to be, first, an inquiry whether purchasers of leaseholds were within the mischief the Legislature intended to guard against; and if they were, then an inquiry whether the word "goods" is sufficiently comprehensive to effectuate the intention of the act.

First, the act was passed for the quiet and in favour of purchasers; and admitting that leaseholds were only bound from the award of execution, it is evident that the first provision in the act does not apply to leaseholds; which are, therefore, clearly within the mischief intended to be guarded against by the second provision, as a sale of them is liable to be overturned by a writ awarded in vacation, and tested in the preceding term; and if we do not hold leaseholds to be within the operation of this branch of the act, purchasers of them are still liable to the danger which the statute intended to guard them against.

Assuming that leaseholds are within the meaning, it remains to inquire whether they are within the words of the act. This depends upon the construction which the word "goods," in the act, ought to receive.

Biens, *bona*, Sir Edward Coke says (*c*), includes all chattels, as well real as personal. *Chattels*, he adds, is a French word, and signifies goods, which by a word of art we call *catalla*. And this, as Sir Wm. Blackstone observes (*d*), is true if understood of the Norman dialect, for in the *Grand Coustumier* (*e*), we find the word *chattels* used and set in opposition to a fief or feud, so that not only goods, but whatever was not a feud, were

(*c*) Co. Litt. 118. b.
(*d*) 2 Com. 385, 7th edit.
(*e*) C. 87.

accounted chattels; and the learned commentator is of opinion that our law adopts it in the same large, extended, negative sense.

This opinion appears to be correct, if confined to the word *chattels*; but it must not be extended to the word *goods*, which, in our law, has a more confined operation.

By the civil law, however, *bona* includes all chattels, as well personal as real; and therefore a general bequest of all one's goods will pass a leasehold estate (*f*), because the civil law guides the construction of bequests of personalty; but it seems clear, that in an assignment, which must be construed according to the rules of the common law, a leasehold estate will not pass under the word *goods* (I).

It appears, therefore, that in some cases that word will include leaseholds, while in others it will not; and the true rule to discover what sense was affixed to it in the statute of frauds seems to be, an investigation of the meaning usually attached to the same word in acts of parliament passed before that statute.

By the statute of West. 2. (*g*), it is enacted, that where,

(*f*) Portman *v.* Willis, Cro. Eliz. 386.
(*g*) 13 Ed. i, c. 19.

(I) This was decided in 4 Edw. 6; but in Portman *v.* Willis, *ubi sup.* Gawdy was of opinion, against Popham and Clench, that a grant of *omnia bona mobilia et immobilia*, would pass leases for years; and so, he said, would a grant of *omnia bona* in general; for 39 H. 6, 35, was, that a man had rent for years, and granted *omnia bona sua*; and it was held that this rent passed; and he vouched 4 Hen. 4, as another authority, because an executor shall have an *ejectione firmæ* by the equity of the statute of 4 Ed. 3, *de bonis asportatis*.

On examination, it appears that the authorities cited by Gawdy do not apply. The grant was of *omnia bona et catalla, tam viva quam mortua*; and in the statute of 4 Edw. 3, the words *biens et chateux* are used.

upon the death of any person intestate and indebted, the *goods* (*bona*) shall come to the ordinary, he shall be bound to pay the debts so far as the *goods* (*bona*) will extend, in the like manner as executors would have been if he had left a will. And in the 31st Edw. 3. (*h*), for the commitment of administration, the word *goods* (*biens*) only is used.

In both these statutes, therefore, the word *goods* was considered as denoting personalty in general. It may indeed be objected, that terms for years were not then much in use; but allowing this, later acts place the point still more out of doubt.

Thus the 21st Hen. 8, c. 5, after directing how administration shall be granted in certain cases of the "goods" of intestates, contains a direction, that surety shall be taken of the administrators for the administration of the "goods, chattels and debts," which they should be authorized to minister (*i*).

In this statute, the word "goods" was used as synonymous to "goods, chattels and debts;" and the point seems to be placed beyond controversy by the same sense being attached to that word in a statute passed but a few years previously to that upon which the present question arises.

The statute to which I allude is the 22d and 23d Car. 2, c. 10, which, after giving power to commit administration of the "goods" of intestates, directs bonds to be taken, with a condition for (amongst other things) making an inventory of the "goods, chattels and credits" of the deceased; which words are used throughout the condition. In fact, the words "goods," "goods, chattels and credits," and "estate," have one and the same meaning attached to them throughout the statute (*k*).

(*h*) Stat. 1, c. 11.
(*i*) And see 43 Eliz. c. 8.
(*k*) And see 29 Car. 2, c. 3, s. 25.

It remains to remark, that Lord Hardwicke seems to have considered leaseholds as within the operation of the 16th section of the statute of frauds, and consequently as not bound until the delivery of the writ of execution to the sheriff.

For in Burdon *v.* Kennedy (*l*), his Lordship said, where an execution by *elegit*, or *fieri facias*, is lodged in a sheriff's hands, it binds goods from that time, except in the case of the Crown, *and a leasehold estate is also affected from that time*; and if the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend to the plaintiff, will be entitled at law to the possession, nowithstanding such assignment (I).

III. There is still another provision in the act of Charles 2. in favour of purchasers. It is enacted, that the day of the month and year of enrolment of recognizances shall be set down in the margin of the roll; and that no recognizance shall bind any lands, &c. in the hands of any purchaser, *bonâ fide* and for valuable consideration, but from the time of such enrolment (*m*).

(*l*) 3 Atk. 739; and see Jeanes *v.* Wilkins, 1 Ves. 195; Forth *v.* Duke of Norfolk, 4 Madd. 503.

(*m*) 29 Cha. 2, c. 3, s. 18.

(I) Note, if the judgment-creditor tamper with the sheriff to have the estate sold at an undervalue, equity will relieve against the sale. Gascoign *v.* Stut, 3 Cha. Rep. 32. See Dillon *v.* Byrn, Irish Term Rep. 600.

SECTION V.

Of Protection from unregistered Deeds, &c.

By several acts of parliament, all deeds and wills concerning estates within the north (*n*), east (*o*), or west (*p*) ridings of the county of York; or within the town and county of Kingston-upon-Hull (*q*); or within the county of Middlesex (*r*), are directed to be registered.

And it is enacted, that all such deeds shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered in the manner thereby prescribed, before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim.

And that all devises by will shall be adjudged fraudulent and void againt subsequent purchasers or mortgagees, unless a memorial of such will be registered within the space of six months after the death of the devisor, or testatrix, dying within Great Britain; or within the space of three years after his or her death, dying upon the sea, or in parts beyond the seas. Wills registered within the time allowed by the act will prevail over even a prior registered conveyance; but no time is limited by the act within which a memorial of a will must be registered. It may therefore be registered at any time where there is no adverse title under a prior registered conveyance; and there is no weight in an objection which has lately been

(*n*) 8 Geo. 2, c. 6.
(*o*) 6 Anne, c. 35.
(*p*) 2 & 3 Anne, c. 4; 5 Anne, c. 18.
(*q*) 6 Anne, c. 35.
(*r*) 7 Anne, c. 20.

made, that the estate descends to the heir at law, if the will be not registered within the periods above specified.

This provision is the same in all the acts, but different provisions are made by the several acts in the case of wills contested or suppressed.

If the devisee of an estate within any of the three ridings of the county of York, or the town of Kingston-upon-Hull, be disabled to exhibit a memorial within the time limited, by the suppression of the will, or other inevitable difficulty, then a memorial entered of such impediment within six months after the death of such devisor or testatrix, who shall die within Great Britain, or within three years after the decease of such person who shall die upon the sea, or beyond the seas ; and a memorial of such will, also registered within six months after the removal of such impediment, will protect the devisees against any purchaser subsequently to the will.

But as to the estates in the north riding of York, it is enacted, that in case of the concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within three years after the death of the devisor.

As to estates in the county of Middlesex, it is provided, that an entry of the impediment within two years after the death of any devisor or testatrix who shall die in Great Britain, or within four years after the decease of such person who shall die upon the sea or beyond the seas; and the registry of a memorial of the will within six months after the removal of the impediment, shall be good. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator.

None of the acts extend to copyhold estates, or to leases at rack-rents, or not exceeding twenty-one years, where

the actual possession and occupation go along with the lease. And the act for the county of Middlesex does not extend to any of the chambers in Serjeants Inn, the Inns of Court, or Inns of Chancery.

And it is by the same acts further provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of the king, his heirs and successors) shall bind any such estates as aforesaid, but only from the time that a memorial thereof shall be duly entered.

This clause is general as to estates in Middlesex; but as to estates in the east and west ridings of York and Kingston-upon-Hull, it is enacted, that the registry of judgments, statutes or recognizances within thirty days after the acknowledging or signing thereof, shall bind all the lands of the defendant at the time of such acknowledgment or signing; and the same provision is made as to estates in the north riding of York, only that the time is limited to twenty days.

In commenting on these important acts, I propose to consider, first, the memorial required by the acts; secondly, what instruments must be registered; thirdly, the exceptions in the acts; and fourthly, the equitable doctrine on these statutes in regard to notice.

I. And first, every memorial of a deed or conveyance is directed by the acts to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, *one whereof to be one of the witnesses to the execution of the deed*; which witness shall, upon his oath before the registrar, prove the signing and sealing of the memorial *and the execution of the deed mentioned in such memorial.*

A line is by mistake omitted in the act for the North Riding of York; the memorial is required to be attested "by two witnesses to the execution of such deed, which witness" is directed to prove the execution of the memorial and the deed. It is evident, that the words in the other acts "one whereof to be one of the witnesses" are omitted after the word "witnesses," and before the words "to the execution of such deed." By this act the person signing the memorial may acknowledge it, and the execution of the deed.

The intention of the Legislature clearly was, that no deed should be memorialized, the execution of which by the *granting party* was not proved on oath by one of the witnesses to it; for although the memorial may be executed either by the grantor or grantee, yet one of the witnesses to it must be a witness to the *execution of the deed*, and this must be understood to mean not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves.

It is however observed, in the Observations on Registry (*s*), that if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of any of them not easily obtained, no further delay need originate from either cause; *as the re-execution of such deed by any one of the parties in the presence of a new witness*, will be sufficient to effectuate the registry.

Now there seems great reason to contend, that such a memorial would be wholly inoperative under the registering acts. A witness to the execution of a deed, which is intended to be registered, was required for the purpose of authenticating the original execution of it, and to prevent

(*s*) Rigge on Reg. p. 76, n (d); Precedent, No. 32, p. 143.

forged deeds from being put on the register (*t*). The requisition of the act is not even substantially complied with by an execution, which is totally inoperative, and which, if it had any operation, would be a fraud upon the revenue.

It seems that the direction in the act, by which the heirs, executors or administrators, guardians or trustees of some or one of the grantors or grantees, are authorized to execute the memorial, has been thought not to convey a very clear idea of the manner in which the registry by such representative is to be effected; and therefore the register requires the instrument to be registered, to be sealed and delivered by the person requiring the registry, as if he was a party in his own right (*u*).

But it seems quite clear, that no such execution is necessary. The representative need execute the memorial *only* in the presence of two witnesses, "one whereof to be one of the witnesses to the execution of such deed or conveyance," which witness will then, according to the very words of the act, prove the signing and sealing of the memorial, and the execution of the deed or conveyance mentioned in such memorial.

So it seems, that where a lease or any other deed is from a corporation, who of course affix merely a seal without any signature, the lessee is required to execute the deed for the conveniency of registry (*x*).

This practice is open to the observation just made; for it is clear, upon principle as well as authority (*y*), that a corporation affixing their seal is tantamount to a *signing* and sealing by an individual. And it is to be observed, that in this and the preceding cases it is indispensably

(*t*) See Hobhouse *v.* Hamilton, 1 Scho. & Lef. 207.

(*u*) Rigge, 74, n. (b); Precedent, No. 31, p. 142.

(*x*) Rigge, 106, 107.

(*y*) Doe *v.* Hogg, 1 New Rep. 306.

requisite that one of the witnesses to the original execution of the instrument intended to be memorialized should be a witness to the memorial.

It appears also, that the registrars are in the habit of receiving and registering certificates of writs of execution (*z*), decrees or orders from the courts of equity, or rules of the courts of law (*a*), office copies of wills (*b*), and certificates of the discharge of judgments (*c*), none of which are authorized to be registered, or can be legally received. And it therefore seems clear, that the registry of such instruments is wholly nugatory, so far as any priority or effect is attempted to be given to them by force of the act.

In regard to the contents of the memorial—the anxiety of the Legislature not wantonly to compel the disclosure of the concerns of individuals, induced them simply to require that every memorial should contain, first, the day of the month and year when the deed, &c. bears date, and the names and additions of all the parties to it, and of the devisor or testatrix of a will, and of all the witnesses to such deed, &c. and the places of their abode; and secondly, the honors, manors, lands, tenements and hereditaments contained in such deed, &c. and the names of the parishes, &c. where any such estates lie that are comprised in or affected by such deed, &c. in such manner as the same are expressed or mentioned in such deed, &c. or to the same effect (*d*). A memorial, therefore, to the following effect would fully comply with the requisitions of the act: "A memorial to be enrolled pursuant to act of parliament, of an indenture. It bears date the 14th day of June 1806. It is made between *A*, of, &c. [here insert the description], of the one part, and *B*, of, &c.

(*z*) Rigge, Precedent, 35, p. 148.
(*a*) *Id.* 83, n. (h).
(*b*) *Id.* 96, n. (s).
(*c*) Rigge, Precedent, 87, n.
(*d*) 7 Anne, c. 20, s. 6.

[here insert the description], of the other part. It comprises all that manor, &c. [here insert the parcels; the general words need not be inserted, but, instead thereof, say, "with their rights, members and appurtenances."] And the said indenture, as to the execution thereof by the said *A* and *B*, is witnessed by *C*, of, &c. [here insert his description], and *D*, of, &c. [here insert his description]. And the said indenture is hereby required to be registered by the said *B*, as witness his hand and seal this 14th day of June 1806. Signed and sealed in the presence of *C* or *D* [one of them must attest the memorial], and *E*, of, &c." It seems, however, advisable to go a step farther, and to state to whom the estate is conveyed, as this, where there are more than two parties, will facilitate a search for incumbrances on the estate; but no good reason can be given why the parties should be put to expense by stating the instrument more fully. When a purchaser discovers what deeds were executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act.

With respect to the parcels it is provided, that where there are more writings than one for making or perfecting any conveyance or security which concerns the same estates, it shall be a sufficient memorial thereof, if all the estates are only once named in the memorial of *any one* of the deeds or writings, and the dates of the rest of the deeds or writings, with the names and additions of the parties and witnesses, and the places of their abodes, are only set down in the memorials of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains the parcels mentioned in all the deeds, and directions how to find the registering of the same (*e*).

This provision has been extended in practice. It is

(*e*) 7 Anne, c. 20, s. 7.

usual, for instance, in a memorial of an assignment of a lease, to refer for the parcels to the prior registry of the lease, although a separate and distinct transaction. This, however, is very incorrect. The statute only authorizes such a reference where several writings are executed to perfect the *same* conveyance or security. And where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered cannot insist on the benefit of the statute against a subsequent purchaser without notice, whose conveyance is duly registered.

II. We are to consider what deeds ought to be registered. It is not easy to conceive that any doubt could arise on this head; but, nevertheless, two questions have been agitated.

First, it has been contended, that a deed of appointment under a power need not be registered; because upon the execution of a power the interest limited by it arises under the deed creating the power. But to this it was answered, that the deed was within the mischief intended to be guarded against by the act, as a purchaser could not otherwise discover whether the power was exercised; and it was accordingly decreed, that deeds of appointment must be registered (*f*).

The other question was, whether the non-registry of a lease was cured by registering an assignment in which the lease was recited; and it was very properly decided, that it was not (*g*); for the intention of the Legislature was, that the register should contain such information as might enable purchasers to ascertain whether estates were or were not subject to incumbrances; for which purpose it is necessary, that the register should contain a regular

(*f*) Scrafton *v.* Quincey, 2 Ves. 413.

(*g*) Honeycomb *v.* Waldron, 2 Str. 1064.

chain of title. If one link is broken, the object of the Legislature is defeated.

In Warburton *v.* Loveland (*h*), which depended upon the Irish act, a new question arose. An unmarried woman being possessed of land in Ireland for a long term of years, and about to marry, assigned the term by a deed, executed also by the intended husband, to trustees, upon trust to permit the husband, after marriage, to receive the rents for life; then the wife for life, then the first son of the marriage, if any, with remainder over. The marriage took effect; the husband entered into possession, and received the rents and profits, and then made a lease for years for part of the term, rendering rent; the lessees entered and received the rents and profits, and then assigned the lease for a valuable consideration. The marriage settlement was not registered; the lease by the husband was registered; the assignment of the lease was supposed not to have been registered. The wife, surviving her husband, obtained possession of the lands; the assignees of the lease brought an ejectment against her to recover the possession.

The questions were, 1st, which title is to be preferred, that of the assignees of the lease, or of the widow, or the trustees under the settlement?

2d. Supposing the assignment of the lease not to have been registered, will the construction be the same?

Upon the first of these questions, the Judges who were summoned were of opinion that, regard being had to the true construction of the Irish Register Act, the title of the assignees of the lease, under the circumstances above stated, is to be preferred to that of the widow, and also to that of the trustees under the settlement; and upon the second question, they were of opinion, that, supposing

(*h*) 2 Dow & Clark, 480. The observations of the Judges are so important, that they are stated at some length.

the assignment of the lease not to have been registered, the construction of the statute remained the same, and the House of Lords decided accordingly. In delivering the opinion of the Judges, Tindall, C. J., observed, upon the facts of this case, Mr. Warburton, who granted the lease of 1800, was at the time of granting it in possession of the premises; and as the marriage settlement of 1779 was never put upon the register, he must have appeared to the public, and amongst the rest, to the lessees taking under the lease of 1800, to be in possession of the premises either in his own right or in right of his wife, in either of which cases he would have had the undoubted right to grant a valid term by the lease of 1800, unless the unregistered settlement of 1779 stood in the way. Now, it was not disputed on the part of the plaintiff in error, that *if Mr. Warburton had been the party who conveyed the term by the unregistered settlement of* 1779, and had afterwards made the lease which was registered, such lessees, being purchasers for a valuable consideration, might have availed themselves of the fifth section of the registry act, and that the prior settlement could have been held fraudulent and void as against the lease. Such a case was admitted to fall within the letter as well as the spirit of the act. But it was contended by the plaintiff in error, that the operation of the Irish Registry Act extended no further, but was confined to cases in which both the earlier and the subsequent conveyances are the deeds of the same grantor; and whether such was the case, or, on the contrary, the act extended to give a preference to the subsequent deed when registered against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, was, in substance, the question now proposed for consideration. No case could be found either upon the English registry acts or upon the Irish act, in which this precise

question had been decided by a court of law. It must, therefore, be determined upon principle, not upon authority; and the only principle of decision that was applicable to it, was the fair construction of the statute itself, to be made out by a careful examination of the terms in which it was framed, and by a reference in all cases where a doubt arises to the object which the Legislature had in view when the statute was passed. Where the language of the act was clear and explicit, they must give effect to it, whatever might be the consequences; for in that case the words of the statute spoke the intention of the Legislature. If in any case a doubt arose upon the words themselves, the Judges must endeavour to solve that doubt, by discovering the object which the Legislature intended to accomplish by passing the act. After examining the provisions of the act, the learned Judge concluded that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration, from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. Now, it was obvious that no more effectual remedy could be devised than by requiring that every deed by which any interests in lands or tenements was transferred, or any charge created thereon, should be put upon the register under the peril, that if it was not found thereon, the subsequent purchaser for a valuable consideration, and without notice, should gain the priority over the former conveyance by the earlier registration of his subsequent deed.

The mischief to the purchasers was the same whether the secret conveyance or charge arose from the deed of his immediate grantor, or that of a former owner of the estate. If the words of the statute will comprehend both, why was he to be protected against a secret deed in the one case, and not in the other? What just ground

of complaint could be urged against such a construction by the grantee under the unregistered deed executed by a former owner of the estate? The deed, if it was a real and a *bonâ fide* transaction, must have been, or ought to have been, in his custody or power from the time of its delivery. What cause could be assigned for its non-appearance upon the register, except either collusion with the grantor, or carelessness and neglect in himself, or mere accident? In neither case would he complain of the construction of the statute by which his own fraud, or his own want of due caution, or an accident which befel himself, was not allowed to operate to the prejudice of the rights of the more diligent purchaser. Suppose a man to settle his property upon his youngest son's marriage, on himself for life, remainder to his eldest son for life, remainder to the younger son, his wife and children, in strict settlement; remainder over in fee; the settlement is not registered, and the settler dies, his eldest son enters, and supposing himself to have the fee conveys to a purchaser for a valuable consideration, shall it be allowed that the younger son, his widow or his children, shall enter and evict the purchaser? Or suppose a like settlement and a like concealment, and the father devises all his lands in trust to sell, and to apply the money to debts and portions, or other purposes: after the estate is sold, and the money distributed, can the construction of this act be such that the purchaser shall be turned out by the claimants under this settlement? Or, in the particular case then before them, where Mrs. Warburton before her marriage might have registered the deed, and the trustees after the marriage were bound in duty to do so if the settlement came to their knowledge, could the proper construction of the act allow Mrs. Warburton to avail herself of her own carelessness or of the breach of duty of her trustees, by

establishing her unregistered deed against a registered lease made by her husband, upon no other ground than that the settlement and the lease were not conveyances by the same person? If there was no provision in the act to prevent this inconvenience, it must be submitted to through necessity; but if there were words in the act capable of such an interpretation as would prevent the inconvenience, they thought themselves bound upon every consideration to give them such an effect. How much more then where the words themselves and their strict grammatical construction appeared to require such a sense? That in all the cases above supposed a great injustice would be worked if the act supplied no remedy, no one can deny; to allow the act to authorize such mischief, would not only be injustice, but would be against law. The language of the act throughout, seemed to establish this to have been its leading object, that as far as deeds were concerned the register should give complete information, and that any necessity of looking further for deeds than into the register itself should be superseded; and it was manifest that no construction of the act was so well calculated to carry into effect this its avowed object as that which forced all transfers and dispositions of every kind, and by whomsoever made, to be put upon the face of the register so as to be open to the inspection of all parties who might at any time claim an interest therein.

It had been further argued that the effect of the marriage settlement was to prevent the husband from having any right to grant the lease of 1800 at the time it was made, for that the wife's right was effectually conveyed as between her husband and herself by the deed of 1779; that she had no interest in her at the time she married; that she could therefore pass no interest to her husband by the marriage; that the husband

consequently never had any right, and therefore could convey none to the lessee. Now, it might be admitted that as against the husband, who was party to the deed of 1779, that deed was valid; it might be admitted also that he could not of right exercise any power over the property inconsistent with that deed; but as by the non-registration of that deed the grantees suffered him, as to the world at large, to have the appearance of right, neither they, nor any claiming under them, were at liberty to set up the deed in opposition to the persons who had been deluded by the appearance of right in the husband. This argument, therefore, which would be good against the husband himself, could not be heard from the parties claiming under the settlement against his grantee for a valuable consideration.

III. We come to the exceptions in the acts.

The first exception is of copyhold estates. This exception is general; and it may be thought that no deed relating to a copyhold estate need be registered. No effectual lien can be created on the land without its appearing on the court-rolls. A lease, indeed, once created by license is a common-law interest, and may be assigned without the assignment appearing in the court books; but this is a very inconsiderable mischief, as the license must appear on the court-rolls. Indeed, in some few manors, copyhold tenants may lease without license, and this is a good custom. But still in all cases, although the interest granted by the lease is a common-law interest, yet the *estate* remains copyhold, and appears to be within the exception in the act. However, it is certainly advisable to register such leases of copyhold estates as, if the estate were freehold, would require registry.

The next exception is of leases at rack-rent. It frequently happens, that a lease originally at rack-rent becomes of some value in the course of a few years. When the lease is sold for a valuable consideration, the question arises, whether it continues within the exception, or ought to be registered (*i*). On the one side it may be urged, that the property being valuable, the lease is within the spirit of the statutes, as a purchaser of it might otherwise be defeated by a prior secret assignment. But, on the other hand, it may be said, that the next exception shows the Legislature did not intend every species of property to be subject to the acts, although it may be a saleable interest. And it may be insisted, that the lease, at the time it was granted, having been within the exception, cannot be affected by any matter *ex post facto*, for then one day it may be within the exception, and another it may be subject to the directions of the act, just as the property may rise or fall in value. Perhaps, therefore, the better opinion is, that a lease originally at rack-rent, and within the exception in the acts, continues so during the term, although it may become a valuable and saleable interest.

The next exception is of leases not exceeding twenty-one years, where the actual possession and occupation go along with the lease. And it has been said, that where such a lease becomes assigned for a valuable consideration, its registry ought always to be recommended, and particularly when such assignment is by way of mortgage, for then it is clearly out of the exemption, the possession and occupation (mentioned conjunctively) being divided (*j*). The latter part of this observation is correct; and it is always usual in practice to require a beneficial

(*i*) See Rigge, 88, n. (n).
(*j*) *Ib.* 88, n. (*o*).

lease, not exceeding twenty-one years, to be registered where it is assigned by way of mortgage. And, indeed, the acts seem cautiously worded, so as not to exempt the lease in that event. But it is impossible to contend, that the assignment of the lease for a valuable consideration can take it out of the exception. It still remains clearly within, as well the spirit as the words of the exception. While the possession and occupation go along with the lease no one can be deceived, and the lease still continues "a lease not exceeding twenty-one years, where the possession and occupation go along with the lease."

The last exception requiring notice is of the chambers in Serjeants Inn, which is certainly within the city; and it therefore seems to have been doubted, whether the Legislature did not intend the act of 7 Anne to include in its operation the whole metropolis, except the borough of Southwark (*k*). But there is not the least ground for this doubt. It is not surprising that the mistake should have been made, and it is impossible to argue, that such an error shall make an act passed relating to lands "in the county of Middlesex," upon the petition of the "justices of the peace, and grand jury of the county of Middlesex," extend to the city of London. This construction would invalidate some thousands of leases, as the general opinion of the Profession is, that the act does not extend to the city.

IV. The fourth division of this subject remains to be discussed. The questions on this head are simply three, viz.

First, Whether a person having the legal estate, as a mortgagee, and advancing more money without notice of a second mortgage duly registered, shall hold against the second mortgage till he is satisfied all the money he

(*k*) Rigge, 88, n. (p).

has advanced? And it hath been adjudged that he shall (*l*) (I).

The decision was made upon this ground: that though the statute avoids deeds not registered, as against purchasers, yet it gives no greater efficacy to deeds that are registered than they had before; and the constant rule of equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole money shall be paid in the first place. By the establishment of the register, the second mortgagee has the best possible means of discovering whether the estate is incumbered, and who the incumbrancer is; and if he has not searched the register, or, having searched the register, has neglected, in compliance with the general rule of equity, to give the prior incumbrancer notice of the second mortgage, he is not considered a proper object for the extraordinary protection of a court of equity; for even the rule of law is *vigilantibus non dormientibus servat lex.*

This principle extends to a mortgagor paying off mortgage-money to a mortgagee, without notice of his having transferred the mortgage, which is a valid payment, although the transfer of the mortgage is duly registered (*m*).

And it is conceived, that the rule would apply to a mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption; and therefore a purchaser of an equity of redemption

(*l*) Bedford *v.* Backhouse, 2 Eq. Ca. Abr. 615, pl. 12; 2 Kel. in Cha. 5; Wrightson *v.* Hudson, 2 Eq. Ca. Abr. 609, pl. 7.

(*m*) Williams *v.* Sorrell, 4 Ves. jun. 389.

(I) Lord Redesdale has determined differently on the Irish registering act, because the act declares that every deed shall be effectual *according to the priority of the time of registry*. There appears to have been considerable difficulty in the way of this decision. Bushell *v.* Bushell, Latouche *v.* Lord Dunsany, 1 Scho. & Lef. 90. 137.

of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate is in a register county, and his conveyance is duly registered. Indeed a purchase of an equity of redemption should never be completed without the concurrence of the mortgagee, for if the mortgagee have another mortgage made to him by the seller, although of a distinct estate for a distinct debt, yet the purchaser of one estate cannot redeem one mortgage without redeeming the other (*n*).

And here it may be remarked, that an assignment should not in any case be taken of a mortgage without the privity of the mortgagor as to the sum really due; for although it undoubtedly is not necessary to give notice to the mortgagor that the mortgage has been assigned (*o*), yet the assignee takes subject to the account between the mortgagor and mortgagee, although no receipt be indorsed on the mortgage-deed for any part of the mortgage-money which has been actually paid off (*p*).

The second question is, Whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance, which was duly registered previously to his purchase? It was decided by Lord Camden, in the case of Morecock *v.* Dickens (*q*), that he shall not; and Lord Redesdale has expressed his opinion to be, that the registry of an equitable incumbrance is not notice to any subsequent purchaser. His Lordship admitted, that if a man searches the register, he will be deemed to have notice, and that no person thinks of purchasing an estate without searching the registry; but he thought it could not be consi-

(*n*) Ireson *v.* Denn, 2 Cox, 425. jun. 118. See 9 Ves. jun. 264.
(*o*) See 9 Ves. jun. 410. (*q*) Ambl. 678.
(*p*) Matthews *v.* Wallwyn, 4 Ves.

dered as notice to all intents, on account of the mischiefs that would arise from such a decision. For if it is taken as constructive notice, it must be taken as notice of every thing that is contained in the memorial: if the memorial contains a recital of another instrument, it is notice of that instrument; if a fact, it is notice of that fact (*r*). So, if it be notice, it must be notice whether the deed be duly registered or not; it may be unduly registered, and if it be so, the act does not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites (*s*).

The third and last question is, Whether a person buying an estate with notice of a prior incumbrance not registered shall in equity be bound by such incumbrance, although he hath at law obtained a priority by registering his deed? And it hath been holden that he shall (*t*).

This decision is consistent with the general principles of equity. The intention of the act was to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and, therefore, where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another in-

(*r*) Bushell *v.* Bushell, 1 Scho. & Lef. 103; and see Pentland *v.* Stokes, 2 Ball & Beatty, 68.

(*s*) Latouche *v.* Lord Dunsany, 1 Scho. & Lef. 157; and see Underwood *v.* Lord Courtown, 2 Scho. & Lef. 64.

(*t*) Lord Forbes *v.* Deniston, 4 Bro. P. C. 189; 2 Eq. Ca. Abr. 482, pl. 19; 3 Atk. 653, cited; Chivall *v.* Nicholls, Str. 664; Beatniff *v.* Smith, 1 Eq. Ca. Abr. 357, pl. 11; Blades *v.* Blades, 1 Eq. Ca. Abr. 358, pl. 12; Hine *v.* Dodd, 2 Atk. 275; Le Neve *v.* Le Neve, 3 Atk. 646; Sheldon *v.* Cox, Ambl. 624; and Jolland *v.* Stainbridge, 3 Ves. jun. 478; and see Cowp. 712; 1 Burr. 474; 1 Scho. & Lef. Rep. 102; Biddulph *v.* St. John, 2 Scho. & Lef. 521; Eyre *v.* Dolphin, 2 Ball & Beat. 290.

cumbrance; because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve (*u*). But of course *notice* of a prior unregistered instrument is unimportant at law The first registered instrument must prevail at law (*x*).

It will occur to the learned reader, that although the prior purchaser would, in a case of this nature, be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

From the foregoing decisions, it is evident that a purchaser may be bound by a judgment (*y*) or a deed, although not registered; but it is equally clear, that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and knowing that registered, in order to defraud them of that title he knew at the time was in them (*z*). Apparent fraud, or *clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of parliament (*a*). A *lis pendens* is not deemed notice for that purpose (*b*).

I have brought to a conclusion the observations which I proposed to offer on the registering acts. If I might be allowed to express a general opinion on the provisions in these acts, explained as they are by the decided cases, I should be tempted to observe that they might be improved. I approve rather of the act for Ireland, though not to the extent to which it has been carried by the

(*u*) Le Neve *v.* Le Neve, 3 Atk. 646.

(*x*) Tunstall *v.* Trappes, 3 Sim. 301.

(*y*) Doe *v.* Allsopp, 5 Barn. & Ald. 142.

(*z*) See 3 Ves. jun. 485.

(*a*) See 2 Atk. 276; and Irons *v.* Kidwell, 1 Ves. 69, cited; Wyat *v.* Burwell, 19 Ves. jun. 435.

(*b*) 19 Ves. jun. 439.

decisions of Lord Redesdale. I would by no means give an equitable charge the effect of a legal conveyance by the mere act of registry; at the same time that I would insure the priority of the charge as an *equitable* charge, by making the registry of an instrument notice to all subsequent purchasers. The rule, that notice of an unregistered incumbrance shall affect the conscience of a subsequent purchaser, I would not disturb, contemplating the present temper of the Courts to confine this doctrine to cases of clear notice.

V. I cannot now dismiss this subject without offering a few cursory observations on the bill which the House of Commons rejected for establishing a general register, as fresh attempts will no doubt be made to carry that measure. I may premise, that if such a bill passes, it will form an addition to this work, but will not call for any alteration of the law in the text, inasmuch as its provisions will be prospective, and will leave titles in register counties to depend for the time past upon the law as it now stands.

It should be borne in mind, that the establishment of a register upon the best plan that could be devised, would not relieve the present titles. To preserve them, the present legal estates must be retained and the present registers resorted to. Some rules should be introduced to relieve titles as they now stand:—1. the representation to terms of years should be facilitated; 2. the liens acquired by judgments, &c. should be regulated or removed as against *bonâ fide* purchasers; for example, it might be required, in order to bind a purchaser, that the *description* of the person against whom a judgment is to operate should be entered up; 3. the law of priorities as between mortgagees should be altered; 4. the doctrine of notice should be restrained; and, lastly, all the *present* registers, including judgments, &c.

should be *revised* and rendered accessible and useful. Such alterations would assist titles as they now stand, and future purchasers under them. A new register would not operate beneficially on titles for many years to come. There is therefore no hurry. And a *general* measure should *follow*, and not *precede* or include the proposed alterations. The present expense in regard to titles is, in forty-nine cases out of fifty, superfluous; but as every one may be in danger, *all* are guarded against it. This precaution has very much increased within the last thirty years, but not from any increased danger.

The present registers have led to much litigation, and have occasioned great expense. In one case, in Ireland, the costs of a *search* were enormous; in several instances in both countries they amounted to 40 *l.* or 50 *l.* The *officers* themselves admit that even *their* searches were frequently insufficient, and that they missed registered documents. Probably not one-twentieth part of the searches is effectual, or could be safely relied upon. Great numbers of instruments have been registered in a manner directly contrary to the provisions of the acts, and therefore ineffectually in law. The slightest mistake may be fatal. If a man's name be Crompton, and it is written Compton in the register, he would lose his estate in a competition with another although later claimant, in whose registry there was no error.

The *proposed system* is a complicated one. It is often almost impossible to ascertain, after a deliberate consideration of the deeds, under which of several titles an estate is held; and a mistake in that particular, or a fraud committed by the seller or mortgagor, would defeat the title. Great difficulty will arise from the necessity of opening new titles with new symbols, connected with the old ones. No one will take the trouble to make these

what they should be, with a view to future purchasers. Every one will content himself with such an entry as he thinks will secure his own title. The officers cannot be depended upon. The trouble will be immediate, and the danger altogether remote and problematical.

The index merely refers to the deed; so that recourse must always be had to a copy of the deed, particularly for the parcels. In how many cases, from lassitude or want of ability, will the search be improperly conducted? After some lapse of time, it will require considerable legal ability to make a perfect search; and by and by, every man must resort to the registry for copies of his deeds. The system of symbols cannot be carried throughout: therefore there must be two systems and many indexes, at least four.

1. General documents, which may be mixed up with other classes and other symbols.

2. Wills, alphabetically.

3. Commissions of bankrupt, alphabetically.

4. Judgments and Crown debts, in the same manner.

And all the deeds must be referred to and read. The purchaser will be answerable for a registry under the proper symbol; and if he make a mistake in the root of his title, or be deceived in it, he will lose his estate. Should a purchaser be exposed to such a hazard? Great knowledge and care are requisite in the officers, and that in all times cannot be depended upon. The term symbol has been withdrawn, but the system has not been altered.

The greater number of frauds is committed in the sale to different persons of a reversionary interest in stock, but no provision is made for registering instruments affecting such property.

Disclosure is now considered as highly desirable; but in the early consideration of the subject the Report

itself suggested a mode of avoiding a disclosure by vesting the *estate* in a trustee as *owner*, and taking a separate deed of trust from him not registered. And the Report said, that in many cases, such as that of an appointment of a reversionary interest, or of portions in favour of children, the registration might be safely delayed; so that *secret* trusts were to be resorted to, and one title appear on the register, and another off it. If appointments should be withheld from the register, a man might buy a child's portion, as in default of appointment, or the estate as not charged with portions, although the child's interest might have been varied or defeated, or the estate burthened with heavy portions. The register would not be a safe guide.

In order to render the register effectual, it was in the first instance proposed, that the operation of general words in the parcels should be cut down; but this was a violent method of giving an effect to the registry, which would not have been endured. Alterations in these respects have been made, to remove the objections to the system, but they are inherent in it.

The expense to which a register may lead, is proved by the evidence of Messrs. Wimburn and Collett, who sent a clerk down to York to search the register, and remain there searching from day to day until the transaction was closed. The establishment of one register for all England and Wales would lead to many journeys to the metropolis, at the expense of purchasers.

The only ground upon which a general registry can be supported is the safety of honest purchasers. But frequently by the negligence of agents, attornies, clerks, sometimes by frauds, even for the value of the fees which have often been charged, although the deeds have not been registered; and at times by the negligence, delay, or want of skill of the officers, or by oversights from which

the most vigilant are not always exempt, heavy losses have, under such a protective measure, fallen on *bonâ fide* purchasers, who have themselves been diligent. The *class*, therefore, to that extent, are sufferers. It is in vain to hope that the registry will save the *class* from an equal degree of loss by protecting them against concealed incumbrances to the same amount, for ignorance, sloth, accident, petty frauds, are more likely to occur than a great and direct fraud on a purchaser or mortgagee by suppressing an incumbrance, and yet the slightest inattention or accident may be more fatal to a purchaser, with the benefit of the Act of Parliament, than the vilest fraud without that protection. No law can impart activity and intelligence to idle and ignorant persons, and many have been ruined without any neglect of their own, by the operation of the register acts.

The Committee of the House of Commons thought that if it were made the law of the land that registration of the conveyance should be as essential to the safety of the purchaser as enrolment now is to the validity of a bargain and sale, men would shape their course accordingly. It was not, they said, to be presumed, that the performance of so essential an act would be neglected in the one case more than the other. In making these remarks, the Committee were of course not aware that the instances are numberless in which bargains and sales have not been enrolled, although they become inoperative if not enrolled within six months; and in very many cases the validity of recoveries depends upon the enrolment. Hundreds of new recoveries have been suffered at a vast expense in consequence of the neglect to enrol bargains and sales, making the tenant to the *præcipe*.

This question must be looked at as one of profit and loss to the *class:* for even the existing statutes have not the merit of giving a priority to an honest purchaser over

a dishonest one; but it is always a question between two honest purchasers; one must suffer; and the loss is simply *transferred* from one of the class to another of the same class. Whether the proposed act would have aggravated the evils, we shall presently consider. Probably few persons have seen more titles than the writer of these remarks, and the cases within his knowledge of suppressed incumbrances are very few indeed; but he believes he never saw a single title in a register county in which important deeds had not been omitted to be registered.

Such a general measure, if established, should be attended with small expense; for if expensive, its benefits would be purchased too dearly; and if they must be bought, small purchases and trifling mortgages would be diminished, to the great injury of the little farmer and the middle classes of society generally, and, therefore, of the country at large. If the rate of insurance be too high, the mariner prefers encountering the perils of the sea. Such a measure is of little use to small purchasers, for they, as experience has shown, are seldom exposed to danger from fraud. The registry would be as expensive upon a purchase of 300 *l.* as upon one for 3,000 *l.* The expense, therefore, should not exceed what a small purchase could fairly bear. Indeed, the measure is proposed to embrace small transactions, not for their protection, but to render the plan itself perfect. The office should be accessible, and therefore it should be local. The plan should be simple; otherwise the chance of a miscarriage would far outbalance any possible good. No man's rights should be unnecessarily, much less wantonly, broken in upon. Therefore of course, no man's title-deeds should be taken from him; and it would not obviate the objection to a provision requiring the deposit of the deeds, that a duplicate copy might be deposited in

lieu of the original; for the rich ought not to be put to the expense, and the poor could not avail themselves of the option, but must deposit their deeds. A man whose deeds were thus deposited, would be prevented from indorsing any deed upon a prior one; by which, in thousands of cases, great expense is avoided, and he would not be able to raise money by a deposit of the deeds themselves. The first men in the city assert, that in moments of panic the want of such a power might be fatal. An Englishman likes to have his "sheep skins" in his own box in "his own castle." A deposit in London of all deeds would require a transmission of deeds from every part of England and Wales, and would expose every man's title-deeds to be lost or defaced. Besides, a collection in London of all the title-deeds of all the property in England and Wales would, in times of confusion and revolution, probably invite the *first* blow. They who approve of Spencean principles would doubtless consider it a considerable step towards an equal division of property, that no man could show a separate title to any given portion of it. The risk of fire; the dangers to be apprehended from the sudden ebullition of a mob; the dishonesty of inferior officers in purloining the old parchments for sale, and the like, may be added to the catalogue. The plan, moreover, would open a fine harvest to a legitimate government for taxation, and to an illegitimate government for confiscation. The State would possess, in one building, all the title-deeds to all the property in England and Wales. If the curse of civil war were to fall upon England, few would like the opposite faction to be in possession of their title-deeds. The Crown would have uninterrupted access to all the documents of any individual whose estate it should seek to recover.

It would be a poor bribe to offer to the present holders of property, that they may retain the deeds they have.

If we legislate for the future, we should not impose burdens which we would ourselves reject. Besides, the measure would affect every man's future title-deeds; so that in a short time we should have only some of our own title-deeds in our own possession.

Such a plan should of course compel a man to no unnecessary disclosure of his dealings. The only legitimate object is notice to future contractors; for that purpose it is not necessary that the whole of the transaction should be disclosed. It is in vain to ask commercial men whether such disclosures are mischievous. No man desires to make his private affairs public, and the public have no right to pry into his affairs except for some legitimate object, and this case presents none. But if all the dealings of men of property, and all their title-deeds were to be disclosed to the world, the mischiefs would be obvious; immediate ruin would not unfrequently be occasioned; flaws in titles would be readily discovered; for the plan will not add to the learning or sagacity of real property lawyers; and Jews would have an opportunity of ascertaining to what extent they could safely supply the demands of an improvident heir. Many a young man has been saved from ruin because he had not the means of proving to money-lenders what his interest was in the family property.

Such a plan, moreover, whilst it gave protection to the diligent should not prefer a dishonest to an honest incumbrancer. As the only legitimate object of such a register is to impart knowledge, its object would be equally accomplished if the subsequent purchaser or mortgagee, although his deed was first registered, had clear notice of the prior deed. The plan, therefore, should leave the present rule of equity to operate, which would postpone the man who bought or advanced his money with notice of a prior right, although obviously express notice should

in such a case be required; and it would be proper to make registry of itself notice, so as to make equitable estates as such binding, if registered. As a purchaser or mortgagee must employ an attorney, if a register be established, the latter should be answerable to his employer for neglecting to search the register, or performing that duty in a perfunctory manner. The officer himself should be responsible to the suffering party in damages, for neglect, carelessness or misconduct.

Of course such an office should not be a Government one; nor be made a source of revenue. Taxation, the registries would not long escape; they offer an irresistible temptation to a Chancellor of the Exchequer, and if he acted cautiously they might in time be made a sure foundation for a new land-tax.

The existing statutes adhered pretty closely to the rules above mentioned. The offices were local, domestic, and readily accessible. No man was required to disclose any more of his deed than would identify it and its general nature, and show the property which it affected; and of course no one was compelled to give up the deeds themselves, or furnish duplicate copies of them. No unnecessary expense was created. The acts legalized no fraud, but left equity to interfere where a man, with notice of another's right, attempted to avail himself of the register as an engine of fraud. They left also every man's attorney to his common law liability for negligence, and rendered the registering officer himself liable for neglect. Government had nothing to do with the office. The register was appointed by the lord lieutenant, and the clerks by the chief officer. These acts led to no extensive mischief, because the persons who knew that certain deeds were not registered, of course must have had notice of the deeds themselves; and the rule of equity, which the acts did not interfere with, forbad

such a person to take advantage of the want of registry; and therefore it was indeed seldom that a title was defeated by the *prior registry* of a *subsequent title.* The system, however, does not work well; because it is expensive to make a long search, and almost impossible to make an effectual one.

Now the proposed act was to extend the system, and to have only one office in the metropolis for all England and Wales; to vest the appointment of a registrar-general in the Crown, and of the inferior officers in the Treasury. It is hard upon a government thus to have patronage forced upon it. If it be desirable to extend registration over the whole of the country, yet experience has shown that the *plan* of registration may not answer. The existing offices afforded the means of trying the new plan upon a limited scale; but instead of availing themselves of this opportunity, the proposers at once established the new system over the whole of England and Wales. Compensation was to have been given to the present holders of office; and however ill the new plan might have worked, it would with difficulty have been abolished, and certainly not without more compensations.

In all material respects the principles of the existing law were departed from. There was to be one great office in London. Men were to be compelled to deposit their deeds, or duplicates of them; and even this had not the merit of rendering it unnecessary to send other particulars with the deeds; so that the new provisions had all the inconveniences of the old, and imposed the additional necessity of depositing the deed, or a duplicate of it; indeed the inconveniences of the existing acts were aggravated, for they once and for all prescribed what was to be furnished, whilst the new bill rendered it necessary to send such particulars as the registrar-general, after certain Gazette announcements, should

from time to time require. The deeds were to be written as the officer should direct, or a fine was to be paid. Of course this plan exposed to public view every man's disposition of his property. Certain checks were introduced in order to prevent improper inspections; but they were worse than useless, for they appeared to give a protection which in reality they never could have afforded. It is said that men will not search from curiosity; that wills are not inspected from that motive. But the fact is, that wills are constantly resorted to by persons who have no interest in the property. Besides, dead men's wills cannot be compared with living men's deeds. It is one thing to know what property a man takes under his father's will, and another how he has himself disposed of it. With a view to attack men's titles, daily resort will be had to the registry. Stratagems of all sorts:—purchases of a lot at an auction; bribes to agents or clerks, are now resorted to in order to obtain from a man's muniment chest the materials for an impeachment of his title. But it is urged, why is not this done as to copyholds? The answer is, that it frequently is, as far as the nature of the court rolls will admit. The writer has known several instances in which court rolls have furnished evidence for an action against the owner of copyholds, whilst none could be obtained for an attack upon his title to freeholds, although equally subject to the flaw.

The Committee of the House of Commons, in their Report, appear to suppose that all titles are in future to be free from flaws. They say, "that no present deed is "to be registered, and that the purchaser will take care "that his deed is effectual to give him the estate for which "he has contracted; and it can in no wise prejudice "him to show to the world that he has really become the "owner of that which he intended to make his by pur-"chase. No defect patent upon deeds *ought* to be con-

" cealed. These deeds ought to be disclosed in such a " manner as to preclude or defeat all persons who have no " interest, and to let in the rightful owner. An exposure " of this kind, and with this view, cannot be too open : *it* " *is the very object and chief aim of registration.* No flaw " need be disclosed in old deeds not registered ; and if the " title appearing on the register is bad, defective or doubt- " ful, justice will be done, and the right established, by an " appeal to judicial decisions." This new view of the object of registration ought not to be lost sight of. We will protect you, say they, from putting on the register your present deeds, so as to guard against your exposing any defects in your title. But how is this reconcilable with the moral precepts which follow? Why are present defects to be concealed, and future ones exposed? But surely it is a duty of imperfect obligation to expose one's title-deeds to the world in order that any defects in them may be detected, and that a man may be stripped of all his property. The law of England acknowledges no such obligation; and few indeed are the cases in which an honest purchaser or mortgagee is compelled to produce his deeds. The Committee observe, in a strain of playful irony, that a purchaser will take care to have an effectual title. But with this view it may be prudent to enact, that conveyancers and solicitors shall in future commit no blunders.

The registry of the deeds themselves, we are told, will protect persons from the loss of them. Now, is *this* a legitimate object of legislation? Why not insure every man's house, stock and cattle for him, and charge him with the premium? Why not register his ledger and day-book, and his annual balances? Speaking generally, men should be left, under wise laws, to take care of themselves and their property.

By the proposed system title-deeds would have been

exposed to danger, in being transmitted to London from all parts of the country; and this was not obviated by the channel of transmission being through the Post-office. The Postmaster-general had no doubt provided athletic postmen to carry the daily burdens; and for the mails, doubtless, light vans would have been substituted.

As the great object of the act was to make registration binding in every event, a subsequent purchaser or mortgagee, although he had notice of the prior conveyance, was not to be bound by it, if he got his own deed first upon the registry. And even in like circumstances a subsequent equitable title was to be made good against the prior purchaser or *bonâ fide* owner. This indeed would have led to the introduction of infinitely greater mischief than that which was proposed to be remedied by the act; for here was an express invitation to roguery. An agent might, although not avowedly, have a direct interest in neglecting to register the deed of his principal. And every profligate owner of an estate would be endeavouring to raise money upon it at the expense of a *bonâ fide* incumbrancer or purchaser, whose confidence, or the carelessness or misconduct of whose agent, had led to an omission to register his deed. Abolish the equitable operation of notice in these cases, and the most revolting frauds might be practised, which equity would not be able to relieve against. If the rule of equity, which is universal, is a bad one, correct or annul it, but do not in this particular case alter it, whilst you leave it thus stigmatized, to have its full bearing upon all other cases.

The Committee of the House of Commons thought that a subsequent deed registered ought to prevail over a prior deed unregistered, although the party who registered the subsequent deed had notice at the time that the prior deed had been executed; but that if it could be proved that the subsequent deed had been obtained by

fraud, and proof of this is altogether independent of notice, registration certainly ought not to give that deed validity; and they conceived that the registration of a fraudulent deed would not prevent a court of equity from giving that relief which the justice of the case requires. The proposed act therefore provided that priority should not be taken away by equity in consequence of notice, and that where priority was given to any person claiming for valuable consideration under a subsequent assurance an equitable estate or interest, such priority should be enforced, although the person claiming under such subsequent assurance should have been affected with notice. Nothing can be more opposed than these provisions are to the principles of equity as administered in this country for centuries. Our rules of equity have had a powerful tendency to establish fair dealing between man and man in contracts. Let the Legislature beware how it wantonly disturbs those rules. Equity knows no higher fraud than a man's purchasing an estate which he is aware has already been sold and conveyed to another, with an intent to take advantage of a slip in the formalities of the registry of the first purchaser's conveyance, or perhaps of an omission to register it altogether. According to the new rule, a man may contract for the purchase of an estate and pay for it—of course he would take care to have a good bargain—although he knows that it has already been conveyed to a prior purchaser whose deed is not registered, and may then compel the first, the honest purchaser, to *convey* the estate to him. A court of iniquity should be established, to give perfection to such base transactions. In the first attempts by the Commissioners at legislation, although notice was made inoperative against a registered deed, yet rights of action were given to counterbalance the operation of the rule. This was an indirect and absurd mode of

giving effect to notice. It was necessarily withdrawn; but the clause abolishing the operation of notice ought to have been withdrawn with the compensation clause.

In order to guard the purchaser against loss, it was at first suggested that the purchase-money might be deposited in the hands of a third person until the deed was registered. But might not the purchaser or seller disapprove of this? It would lead to great evils. The money might be lost by the dishonesty or failure of the depositary. The provisions of the act would have exposed every man's purchase or mortgage to such imminent hazard, that however remote might be his residence from the metropolis, his only safety would be in completing his purchase on the threshold of the metropolitan office, and then rushing into it with the deed for registration. Country solicitors would not allow all the business to be transacted by London solicitors. They would frequently send their clerks to town, or go themselves, to make the searches. The caveat which the act authorized to be entered in certain cases, only exhibited the danger of the system. The caution could not have been given in many cases, and in all would have been so troublesome and costly, such a clog upon contracts, that few would have had recourse to it unless it had become an ordinary mode of inflaming the agent's bill. Upon a registry there *may*, in every case, be a race, and the race should be to the swift. A man should not be allowed to give perfection to an imperfect transaction by a caveat which would operate against a prior perfect instrument.

But whatever might have been the diligence of the purchaser or incumbrancer, yet he might lose his estate or money through the carelessness, dishonesty or want of skill in the officers of the establishment. The system was a new one, and however excellent, it might have been found difficult to follow it literally, and the slightest

blunder might have defeated the title, or the smallest delay might have proved fatal. There was little prospect of a man's recovering damages for any loss occasioned by the neglect, ignorance or misconduct of the officers. For the registrar-general was empowered to require such statements from time to time as he should think proper, to be sent with the assurances for regulating the entries, and in case no statement should have been sent conformably with such order, the purchaser or incumbrancer was to be without remedy on account of any omission, delay or error in the entry. The remedy would practically have been nominal. The purchaser's own solicitor was improperly exonerated, if he directed an office search, and obtained a certificate of the result. If any loss was sustained by any omission, mistake or misfeasance of any officer, *and the purchaser could maintain an action*, the damages were to be paid out of the consolidated fund. Some Chancellor of the Exchequer would have started at an item of 100,000 *l.* for damages, occasioned by a clerk's writing "Compton" for "Crompton"!

The plan would probably have given great countenance for a time to forged deeds. In the many instances in which confidential agents have forged deeds, they have always given sufficient publicity to them. The registry of a forged deed would not be more likely to bring it to the knowledge of the person whose name was forged, than the delivery of the deed to a purchaser or mortgagee; but the registry of such a deed would nevertheless induce others to place more confidence in it. The plan did not require deeds to be authenticated before they were registered. In that instance also, the existing rule was departed from.

It was no part of the plan to improve men's present titles; they were to remain subject to their original infirmities. The expense of erecting a building—of course

a national ornament—and of the establishment, would have been large, but still such a measure should not have been made a source of revenue, or in other words, of taxation, and therefore, if ever the plan be adopted, provision should be made for reducing the fees to a level with the expenditure. The act exempted memorials from stamp duty. But as has already been remarked, the temptation would be too great for a Chancellor of the Exchequer long to resist; they would inevitably be subjected to a heavy duty, and thus the landed interest would be taxed for a security which the act would in vain affect to afford to them. For these reasons, the writer has always been averse to the extension of the system of registration; and an examination of the proposed measure, after all the amendments it received, has satisfied him that its certain operation, if it had passed into a law, would have been to create great expense, and cause much vexation; but that it was more than doubtful, whether to the general class of honest purchasers, the loss it would occasion would not have preponderated over the profit.

The act has been framed with ability, and the scheme of registration is a great improvement upon its predecessors; but the fault is in the system, which never can afford the security which it affects to give whilst it introduces dangers and difficulties that no talents can obviate. The examples afforded by the registers of Ireland and Scotland, offer no temptation to England to imitate them. In a few years, a general register would be destroyed by its own enormous weight.

SECTION VI.

Of Protection from Acts of Papistry.

By the 11 & 12 Will. 3, c. 4, it was enacted, that papists who should not, within six months after attaining eighteen, take the oaths and subscribe the declaration therein mentioned, should, but as to himself or herself only, be incapable to take by descent, devise or limitation; and the estate should be enjoyed by the next of kin, being a protestant, during the life, or until the conformity of such papist. And by this act papists were rendered incapable of purchasing lands, either in their own names, or in the names of trustees; and all estates made to them were declared to be utterly void and of none effect, to all intents, contructions and purposes whatsoever.

To remedy the inconveniences arising from this provision, it was by a modern statute (*c*) enacted, that no sale for a full and valuable consideration by a papist, of any lands, or of any interest therein theretofore made, or thereafter to be made, to a protestant purchaser, should be impeached by reason of any disability of the vendor, or of any persons under whom he claimed, in consequence of the 11 & 12 Will. 3 (*d*); unless the person taking advantage of such disability should have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale should have entered his claim at the quarter-sessions, and *bonâ fide* pursued his remedy. But it was expressly provided, that the clause in 11 &

(*c*) 3 Geo. 1, c. 18. See 29 Geo. 3, c. 36, s. 4.

(*d*) *Vide supra*, vol. 2, p. 108.

12 Will. 3, disabling papists from purchasing, should remain in full force.

In the case of Fairclaim *v.* Newland (*e*), the Court of King's Bench expressed an extra-judicial opinion, that the statute of Geo. 1. did not in every case authorize a sale by a papist to a protestant purchaser. They considered the statute of Will. 3. as having different provisions for persons of different ages, viz. as to those under eighteen, estates limited to them were vested for the benefit of their posterity, *and these were intended to be able to convey to protestants*; but as to others above eighteen, they are absolutely disabled from taking any estate by purchase, and the statute of George never intended to enable them to convey what they had not.

In a case before Lord Hardwicke, two years afterwards, it was insisted that the proviso in the act of George restrained the enacting part to a statute of James recited in the act of George; and that the statute of William, by the express words of the proviso, remained in full force. Lord Hardwicke, however, said "that the statute of William was to be sure made to prevent papists from acquiring new estates. Then came the statute of Geo. 1, and this statute, and the proviso in it, had a seeming repugnancy, and he would take notice, that the statute in this respect had always been doubtful; some people had thought that the proviso restrained the statute, and it was certainly a very odd proviso. But he thought the meaning of the proviso was only *ex abundanti cautela* against papists, and was not designed to affect purchasers; for if it were otherwise, the security to protestant purchasers, under the statute, would be a most doubtful security." And he considered the enacting part of the statute as in full force for the benefit of a protes-

(*e*) 8 Vin. Abr. 73, pl. 4.

tant purchaser, although it was not necessary to decide the point (*f*).

Mr. Wilbraham was one of the counsel for the plaintiff in the last case, and in an opinion given by him on this point a few years afterwards, he thought that the act of Geo. 1. authorized a sale by a papist purchaser to a protestant purchaser, and was not in that respect controlled by the proviso. He stated, that as the opinion of the eminent conveyancers, from the time of passing the act in 1717, till about the year 1740, had been, that popish purchasers might sell; and as it was the opinion of the present Chancellor, and several eminent lawyers, they might sell, he was of the same opinion, though the Court of King's Bench seemed to be of a contrary opinion in a trial at bar, in the year 1741, between Fairchild and Newland (*g*). Indeed it seems surprising that any doubt should have arisen on this point, as the act was passed for the express purpose of encouraging Roman catholics to sell their estates to protestants, however they might have acquired them; and the Legislature was only anxious that Roman catholics should not derive any power from the act to purchase *and hold* estates. A different construction would deprive the act of nearly all operation. It has now, however, long been thought the better opinion, that the proviso does not defeat the enacting part in favour of protestant purchasers, and on the authority of it many purchases of considerable consequence have been made (*h*).

The act requires the sale to be " for a full and valu-

(*f*) Wildigos *v.* Keeble, 8 Vin. Abr. 73, pl. 5. See S. C. cited, 1 Atk. 535; 2 Ves. 392, nom. Wildgoose *v.* Moore.

(*g*) 2 Vol. Cas. and Opin. 60; and see several other opinions, *ib.* 54 to 71.

(*h*) See Mr. Butler's learned note to Co. Litt. 391, a, s. 3. See also 43 Geo. 3, c. 30; and see O'Fallon *v.* Dillon, 2 Scho. & Lef. 13, for the construction of popery acts.

able consideration;" but the purchase will be protected by the statute, although a year's purchase more might have been obtained for the estate, the consideration being only evidence of the reality of the purchase (*i*).

And although a purchase from a papist was made under suspicious circumstances, yet if the purchaser has paid any part of the purchase-money, he may plead the statute of Will. 3, in bar to a bill for a discovery from him, whether the vendor was a papist; for by his discovery the estate might perhaps be recovered at law, and then he would lose the money he had paid (*k*).

On this statute it remains to observe, that a purchaser having notice of the vendor being a papist, and under a disability to hold, is immaterial, unless it was given to him by the person taking advantage of the disability according to the act of Geo. 1.

I have allowed this section to remain, as it is short, and possibly a knowledge of its contents may be required; but by the 10 Geo. 4, c. 7, s. 23, it is enacted, that after the passing of that act no oath or oaths shall be tendered to or required to be taken by his Majesty's subjects professing the Roman catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by his Majesty's other subjects.

(*i*) Wildgoose *v.* Moore, 1 Atk. 455; Smith *v.* Read, 1 Atk. 526. 535; 2 Ves. 392, cited; *vide supra*; 2 Atk. 210; Barnard. Rep. Cha.

(*k*) Harrison *v.* Southcote, 1 Atk. 528; 2 Ves. 389.

SECTION VII.

Of Protection from Defects in Recoveries.

HERE may be mentioned the 4th section of the 14 Geo. 2, c. 20, for which the Profession is indebted to the late Mr. Pigot; whereby, after reciting, that by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights; it is enacted, "that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates, in lands, tenements or hereditaments, whereof a recovery or recoveries is, are or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her or them, *having been in possession of the purchased estate or estates from the time of such purchase*, shall and may, *after the end of twenty years from the time of such purchase*, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries; and declaring the uses of a recovery or recoveries; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: provided always, that the person or persons making such deed or deeds as

aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

This clause will still operate upon existing titles; but its further operation is now at an end, for by the 3 & 4 Will. 4, c. 74(*l*), fines and recoveries are abolished. This last act contains several provisions in favour of purchasers. By s. 38, it is enacted, that when a tenant in tail of lands under a settlement shall have already created, or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under that act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector, if any, of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent, as against all persons except those whose rights are saved by the act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then such disposition shall have the effect of confirming such voidable estate, so far as such tenant in tail would then be capable under the act of confirming the same without such consent, provided that if such disposition shall be made to a purchaser for valuable consideration, who shall

(*l*) *Supra*, vol. 1. p. 380.

not have express notice of the voidable estate, then the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

And by s. 62, it is enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created, or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under a fiat, and the commissioner acting in the execution of such fiat shall make any disposition, under the act, of the lands in which such voidable estate shall be created, or any of them, then, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector, he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under the act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the acts of 6 Geo. 4. and the 1 & 2 Will. 4, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent, as against all persons except those whose rights are saved by that act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under the act of confirming the voidable estate to its full extent, then and in

such case such disposition shall have the effect of confirming such voidable estate, so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under the act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent, as against all persons except those whose rights are saved by the act; provided that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

But by s. 47 it is enacted, that in cases of dispositions of lands under the act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act, by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by the act to tenants in tail, or of the powers of consent given by the act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail, or protector of a settlement, which in

a court of law would not be an effectual disposition or consent under the Act; and that no disposition of lands under the act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under the act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under the act in a court of law.

SECTION VIII.

Of Protection from Defects in Sales for Land-Tax.

We may here notice the 12th section of the 54 Geo. 3, c. 173, whereby, after reciting that for the purpose of redeeming land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax charged on lands and other hereditaments belonging to persons for the time being seised or possessed, or entitled beneficially in possession to the rents and profits of, but not having the absolute estate or interest in, such lands or other hereditaments, or for some other purposes for which lands and hereditaments are authorized to be sold by such persons under the powers and provisions of the said act of the 42d of Geo. 3, or of some subsequent act relating to the redemption and sale of the land-tax, some sales of lands and other hereditaments may have been or may be made by persons so seised or entitled, not strictly authorized to sell by such powers and provisions without some further assurance in the law, or by reason that all the lands and other hereditaments of or to which the persons making such sales were respectively so seised or entitled,

did not at the times of such sales stand limited and settled, and subject to or for the same uses, trusts, intents and purposes, or by reason that a greater quantity of an estate has been sold than may have been necessary to be sold for the authorized purposes, or by reason of some other mistake or inadvertence; It is enacted, that all sales so made as aforesaid, and all conveyances executed of the lands or other hereditaments so sold, provided the same have been respectively made and executed *bonâ fide* and for valuable consideration, and shall appear to have been made and executed under the authority and with the consent and approbation of the commissioners, as required by the said acts or any of them, in cases of sales under the powers of the said acts, shall be and the same are thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and shall be from such respective periods as valid and effectual in the law as if such sales and conveyances had been made and executed in strict conformity to the powers and provisions under which the same were i ntended to have effect, any thing in the said act of the 42d of Geo. 3, or of any such subsequent act, as aforesaid, to the contrary notwithstanding. But this provision is qualified by a proviso, that every person injured or prejudiced by any sales thereby confirmed shall be entitled to relief, either by the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court, on such petition, and an order thereupon; and shall, under such decree or order, have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments as such court shall order or direct; and the said court shall have full power to adjust the

proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court shall, under the circumstances of the case, in its discretion, think proper; and shall also have power to make such order respecting the costs of the parties as the said court shall think fit.

By the 57th of Geo. 3, c. 100, s. 22, after reciting that it appeared that some deeds of sale, which previous to the revocation of the commissions theretofore granted under the royal sign-manual, enabling the persons therein named to be commissioners for the redemption and sale of the land-tax, were intended to have been executed by and under the authority of the persons named in such commissions, had been executed by the tenants for life, or other persons having authority, with the consent of such commissioners to make such sales, but had not been executed by such commissioners, and difficulties had in some instances arisen as to the mode of confirming titles under such imperfect conveyances, and that it was expedient that a discretionary power should be given to the commissioners for the affairs of taxes of confirming the same, and also any deed of mortgage or grant that might for the same cause be found imperfect, it was therefore enacted, that upon production to the commissioners for the affairs of taxes, or any two of them, of any deeds of sale, mortgage or grant, that had been executed by any tenant or tenants for life, or other person or persons having authority under the land-tax redemption-acts for the time being, to make any such sale, mortgage or grant, with the consent and approbation of two or more of the commissioners for the time being, appointed by and under the royal sign-manual, but which deeds of sale, mortgage or grant had not been executed by the commissioners whose consent was necessary to the vali-

dity thereof respectively, it should be lawful for the said commissioners for the affairs of taxes, or any two of them, on their being satisfied that such deeds of sale, mortgage or grant would have been authorized and available under the powers and provisions of the said acts, or some of them, if two of the commissioners for the time being, acting by virtue of the royal sign-manual, had been parties to and executed the same, to sign and seal such deeds of sale, mortgage and grant, and to cause such indorsements to be made on such deeds respectively, as the said commissioners for the affairs of taxes might, under the circumstances of the case, think necessary or proper for showing their assent to and confirmation of such sales, mortgages or grants; and all such deeds of sale, mortgage or grant, which should be so signed and sealed by the said commissioners for the affairs of taxes, or any two of them, and upon which any such indorsement should be made, should be and the same were thereby respectively ratified and confirmed from the respective periods at which such sales, mortgages or grants were respectively intended to take effect, and the same should be from such respective periods as valid and effectual in the law, and be considered as conferring upon the respective purchasers or mortgagees of the lands and hereditaments therein respectively comprised, or upon the respective grantees of any rent-charges, and all persons claiming by, from, through, under or in trust for them respectively, as good a title to the lands or hereditaments sold or mortgaged, or to the rent-charges granted, as if two of the commissioners for the time being, acting under the royal sign-manual, and who would have been competent under the acts for the time being to consent to such sales, mortgages or grants respectively, had approved of and consented thereto respectively, by signing and sealing such deeds respectively; and no deeds of sale, mortgage or grant, so to be

confirmed, should require any stamp-duty by reason of any execution thereof by the commissioners for the affairs of taxes, or by reason of any such indorsement to be made thereon, as aforesaid.

And it was further enacted (*m*), that where any contract should have been entered into for the redemption of any land-tax, and any contract should have been entered into for sale of any lands or other hereditaments for the purpose of raising money to complete the contract for the redemption of such land-tax, and it should appear that such contract for sale could not, under the powers and authorities of the land-tax redemption-acts, or any of them, or by reason of some defect in the title to the lands or other hereditaments comprised in such contracts for sale, be completed, it should be lawful for the commissioners for the affairs of taxes, or any two of them, to rescind and declare void such contract for redemption of land-tax, and thereupon it should be lawful for the said commissioners to make such orders, and give such directions, as they should think proper for the re-transfer of any stock, or the re-payment of any money that might have been previously transferred or paid in pursuance of such rescinded contract; and the governor and company of the Bank of England, the commissioners for the reduction of the national debt, and the several receivers-general in England and collectors in Scotland, to whom the same might respectively appertain, should, upon a certificate of such contract being so rescinded, make, and they are hereby respectively required to make, such re-transfer or re-payment accordingly.

And after reciting that it was expedient to make provision for the enrolment and register of deeds, which had not been duly enrolled or registered pursuant to the directions of the several acts passed relating to the re-

(*m*) Sec. 23.

demption of the land-tax, it was enacted (*n*), that all deeds required by the said acts, or any of them, to be enrolled or registered, should be valid and effectual, although the same should not have been or should not be enrolled or registered within the periods prescribed by the said acts respectively, provided the same should have been enrolled or registered before the passing of the said act, or should be enrolled or registered within twelve calendar months after the passing thereof; and that in any case such deeds should not be enrolled or registered within twelve calendar months after the passing of the said act, or any deeds thereafter to be executed under the powers of the said acts, or any of them, or of this present act, should not be enrolled or registered within six calendar months after the execution thereof respectively, it should be lawful for any two or more of the commissioners for the time being for the redemption and sale of the land-tax, if they should think fit, upon the production of any such deeds, to order the same to be enrolled or registered; and that all deeds to be enrolled or registered pursuant to any such order should be as valid and effectual as if the same had been enrolled or registered within the periods prescribed by the said acts, or by this present act; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be enrolled or registered under this act, and depending in point of title on such deeds, should be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof: nevertheless, without prejudice to the validity of any assurances theretofore made, or thereafter to be made, to correct or supply any defects arising from the want of such enrolment or registry.

And after reciting that for the purpose of redeeming or

(*n*) Sec. 24.

purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts theretofore passed, relating to the redemption and sale of the land-tax or some of them, some sales of lands and other hereditaments had been made, the title to which, as derived under such sales, might be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof, it was further enacted (*o*), that all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as thereinbefore was mentioned, provided such conveyances should appear to have been executed under the authority and with the consent and approbation of the respective commissioners for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, should be and the same were thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same should be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under or in trust for them respectively, a good and valid title, both at law and in equity, to such lands and hereditaments, to all intents and purposes whatsoever; any thing in the said acts, or any law or custom to the contrary notwithstanding.

(*o*) Sec. 25.

And it was further enacted (*p*), that every person who might conceive himself or herself injured or prejudiced by any sales thereby confirmed, should at any time within five years after the passing of the said act, if such persons should not be under any legal disability, but if he or she should be under any legal disability, then within five years next after such disability should be removed, be entitled to relief either by the decree of a court of equity, on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court on such petition, and an order thereupon, and should under such decree or order have an annual rent-charge to such amount, and for and during such term or estate, and charged upon such lands or other hereditaments, as such court should order or direct; and the said court should have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court should, under the circumstances of the case, in its discretion, think proper; and should also have power to make such order respecting the costs of the parties as the court should think fit.

SECTION IX.

Of Protection from Crown Debts.

Formerly, where the seller was a debtor or accountant to the Crown, the title was not good until a *quietus* was entered up on record. And a purchaser could not be compelled to take the title, although the Crown consented to

(*p*) Sec. 26.

the payment of the purchase-money into the Exchequer on account of the debt (*q*).

To obviate this difficulty, it was by the 10th section of an act of the 1st and 2d year of Geo. 4, c. 121, intituled, "An act to alter and abolish certain forms and proceedings in the exchequer and audit-office relative to public accountants, and for making further provisions for the purpose of facilitating and expediting the passing of public accounts in Great Britain, and to render perpetual and amend an act, passed in the 54th year of his late Majesty, for the effectual examination of the accounts of certain colonial revenues," enacted, that in all cases where any estate belonging to a public accountant shall be sold under any writ of extent, or any decree or order of the Courts of Chancery or Exchequer, and the purchaser or purchasers thereof or of any part thereof shall have paid his, her or their purchase-money into the receipt of his Majesty's Exchequer, an entry of such payment shall be made by the commissioners for auditing the public accounts in the declared account of such public accountant, and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her and their heirs and assigns, shall be wholly exonerated and discharged from all further claims of his Majesty, his heirs or successors, for or in respect of any debt arising upon such declared account, although his, her or their purchase-money shall not be sufficient in amount to discharge the whole of the said debt.

This provision was made to meet a particular case, and is therefore by no means a general remedy. In the case alluded to, the debtor was dead, and there was a declared account against him, which, as he was dead, could not be increased by further receipts. Upon a petition by the

(*q*) Brakespear v. Innes, V. C. Master of the Rolls, MS.

seller after the act, Sir Thomas Plumer, Master of the Rolls, ordered the seller to pay the costs of the petition, and of the payment into the Exchequer, and of the entry being made by the commissioners. The purchaser claimed an abatement for dilapidations, and it was submitted whether the payment of the balance would satisfy the act. The Master of the Rolls held that it would.

With respect to the general operation of statutes passed in favour of purchasers, it may be laid down as a rule, that equity will not permit them to be taken advantage of where the purchasers have notice of the incumbrance or deceit which the statutes were intended to guard them against, because *qui scit se decipi non decipitur*, and the resolutions respecting voluntary settlements must be considered anomalous.

SECTION X.

Of Equitable Relief and Protection.

1. Thus have we taken a cursory view of the several statutes passed for the relief or protection of purchasers. The relief and protection afforded to purchasers by the rules of equity form the next branch of our inquiry.

A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration *bonâ fide, and without notice of any claim on the estate*, such a man is entitled to the peculiar favour and protection of a court of equity.

And it has been laid down as a general rule, that a purchaser *bonâ fide*, and for a valuable consideration, without notice of any defect in his title *at the time he made his purchase*, may buy or get in a statute, mortgage,

or any other incumbrance (and that although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz. where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another (*r*).

And the favour and protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person (*s*).

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee in whom it was vested upon express trusts (*t*).

The Court of Chancery will not supersede a commission of bankruptcy even for fraud, where there have been purchasers under it (*u*); for a commission being superseded, all falls with it (*x*). So equity will not relieve against a *bonâ fide* purchaser without notice, although the remedy be gone by accident (*y*), nor will it compel him to discover any writings which may weaken his title (*z*); or

(*r*) Basset *v.* Nosworthy, Finch, 102; Jerrard *v.* Saunders, 2 Ves. jun. 454. See Anon. 2 Cha. Ca. 208; Hithcox *v.* Sedgwick, 2 Vern. 156; Goleborn *v.* Alcock, 2 Sim. 552.

(*s*) See 2 Vern. 600; Willoughby *v.* Willoughby, 1 Term Rep. 763; Blake *v.* Sir Edward Hungerford, Prec. Cha. 158; Charlton *v.* Low, 3 P. Wms. 328. *Ex parte* Knott, 11 Ves. jun. 609; Shine *v.* Gough, 1 Ball & Beatty, 436.

(*t*) Saunders *v.* Dehew, 2 Vern. 271; 2 Freem. 123.

(*u*) *Ex parte* Edwards, 10 Ves. jun. 104; *ex parte* Leman, 13 Ves. jun, 271; *ex parte* Rawson, 1 Ves. & Bea. 160; *ex parte* Lautour, 1 Mont. & Bligh. 89.

(*x*) See 1 Ves. & Bea. 66.

(*y*) Harvy *v.* Woodhouse, Sel. Cha. Ca. 80; Bell *v.* Cundall, Ambl. 101.

(*z*) Bishop of Worcester *v.* Parker, 2 Vern. 255; Hall *v.* Adkin-

take any advantage from him by which he may protect himself at law, or obtain terms of his antagonist (*a*); neither will equity give any person an advantage over (*b*) a purchaser, or any assistance against him (*c*); and his having taken a collateral security for the title will not make his case worse (*d*), (I) unless the purchase by the vendor was fraudulent, in which case it would have considerable weight with a court of equity (*e*).

The rules on this subject have gone so far, that a purchaser *bonâ fide*, for valuable consideration, and without notice, has been allowed to take advantage of a deed which he stole out of a window by means of a ladder (*f*), and of a deed obtained by a third person without consideration, and by fraud (*g*).

If a man purchase for valuable consideration, without notice from a disseisor, and the disseisee is a trustee for another, although the general rule is, that a trustee is bound to convey, upon request, to his *cestui que trust*, yet if in this case the trustee refuse to convey the legal

son, 2 Vern. 463; 1 Eq. Ca. Abr. 333, pl. 54; Millard's case, 2 Freem. 43; Sir John Burlace *v.* Cook, 2 Freem. 24; Jerrard *v.* Saunders, 2 Ves. jun. 454.

(*a*) Walwynn *v.* Lee, 9 Ves. jun. 24.

(*b*) Bechinall *v.* Arnold, 1 Vern. 354.

(*c*) See Graham *v.* Graham, 1 Ves. 262.

(*d*) Lowther *v.* Carleton, For. 187, S. C. MS. See, however, White *v.* Stringer, 2 Lev. 105; Jennings *v.* Selleck, 1 Vern. 467.

(*e*) How *v.* Weldon, 2 Ves. 516.

(*f*) See a case cited in Sanders *v.* Deligne, 2 Freem. 123; and Siddon *v.* Charnells, Bunb. 298; and see Fagg's case, cited 1 Vern. 52, and reported in 1 Cha. Ca. 68, *nomine* Sherly *v.* Fagg, where the circumstance of theft does not appear.

(*g*) Harcourt *v.* Knowel, 2 Vern. 159, cited.

(I) In Lowther *v.* Carleton, the bond of indemnity was given by the executors of the first purchaser who bought without notice to the second purchaser, who bought of them with notice, and he was allowed to avail himself of the want of notice in the first purchaser.

estate to the *cestui que trust*, or to suffer the latter to bring an ejectment in his (the trustee's) name, a court of equity will not compel the trustee to do so, because it would in effect be granting relief against a purchaser (*h*). This case strongly marks the favour shown to a *bonâ fide* purchaser.

Equity will relieve a *bonâ fide* purchaser without notice from ancient statutes, if there be no direct proof on either side, and will decree them to be cancelled (*i*).

And this rule extends to mortgages, and all incumbrances which have lain dormant for a long time, and no demand made in respect thereof (*k*).

So equity will relieve a purchaser for valuable consideration against a defective execution of a power, in the same manner as he will be relieved against a defective surrender of copyholds (*l*).

But if a devisee, having an estate for life, with a power to dispose of the inheritance by *will*, sell the estate in his life-time, equity cannot relieve the purchaser, although by the effect of accident he has got the legal estate in fee-simple; for, in a case like this, the testator cannot be understood to mean that the devisee should so execute the power. The intention is, that he should give by will, or not at all; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of the devisee's death, can be considered, in

(*h*) Turner *v.* Back, 22 Vin. p. 21, pl. 5, where the *cestui que trust* claimed under a voluntary settlement.

(*i*) Burgh *v.* Wolf, Toth. 226; Smith *v.* Rosewell, *ibid.* 247; and see *ibid.* 224.

(*k*) See Abdy *v.* Loveday, Finch, 250; Sibson *v.* Fletcher, 1 Cha. Rep. 32.

(*l*) *Vide infra*; and see Chapman *v.* Gibson, 3 Bro. C. C. 229; Treat. of Powers, ch. 6.

equity, an attempt in or towards the execution of the power (*m*).

The mistake or ignorance of any of the parties to a conveyance of their rights in the estate will not turn to the prejudice of a *bonâ fide* purchaser for a valuable consideration (*n*).

If, however, upon a purchase, any person is required to join to obviate an objection to the title, and the objection is stated in such a manner as not to convey full information, the purchaser cannot avail himself of the instrument against the person executing it (*o*).

But if a person having only a general statement that there are objections to a title which his concurrence will obviate, upon that communication executes an instrument and conveys, there is nothing to affect the conscience of the purchaser, so that the person conveying could ever get the estate back. If he does not ask the nature of the objections, he determines against himself as to any question between him and the purchaser, if the deed does not show that the objections were withheld from him (*p*).

If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right (*q*), although covert (*r*), or under age (*s*).

(*m*) *Per* Lord Eldon; Reid *v.* Shergold, 10 Ves. jun. 370. The opinions of several eminent lawyers were taken on this case, before it went into court, and they all agreed that the case was desperate. In fact, it was owing to those discussions that the plaintiff in this cause knew of his claim, and recovered the estate. *Vide supra*, vol. i. p. 12.

(*n*) Malden *v.* Menill, 2 Atk. 8.

(*o*) Lord Braybroke *v.* Inskip, 8 Ves. jun. 417.

(*p*) Lord Braybroke *v.* Inskip, *ubi sup.* See 3 Swanst. 73.

(*q*) Hobs *v.* Norton, 2 Cha. Ca. 128; Hanning *v.* Ferrers, 2 Eq. Ca. Abr. 356, pl. 20; and see 1 Freem. 310; 16 Ves. jun. 253.

(*r*) Savage *v.* Foster, 9 Mod. 35; and see Evans *v.* Bicknell, 6 Ves. jun. 174.

(*s*) Watts *v.* Creswell, 9 Vin.

And the same rule prevails even where the representation is made through a mistake, if the person making it might have had notice of his right (*t*) (I).

So where a person, intending to buy an estate, inquires of another whether he has any incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance (*u*). Again, where a purchaser of an equitable right inquires of the trustee of the legal estate whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse (*x*).

But a person having an incumbrance upon an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate (*y*).

If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance (*z*).

415; 9 Mod. 38. 96, 97; 4 Bro. C. C. 507, n.; Clare *v.* Earl of Bedford, 13 Vin. 536; and see 3 Cha. Ca. 85. 123; Cory *v.* Gerteken, 2 Madd. 46.

(*t*) Pearson *v.* Morgan, 2 Bro. C. C. 388*; see also Teasdale *v.* Teasdale, Sel. Cha. Ca. 59; but observe the circumstances of that case.

(*u*) *Supra*, vol. i. p. 9.

(*x*) Burrowes *v.* Lock, 10 Ves. jun. 470; *supra*, vol. i. p. 5.

(*y*) Osborn *v.* Lea, 9 Mod. 96.

(*z*) Jaques *v.* Huntly, 1 Cha. Rep. 5, cited; Taylor *v.* Wheeler, 2 Vern. 564; Morse *v.* Faulkner, 1 Anstr. 11; and see 2 Ves. jun. 151; 6 Ves. jun. 745; 11 Ves. jun. 625. See vol. ii. 103, *supra*.

(I) *Sed qu.* this as a general rule, unless there be *fraud?* See Haycroft *v.* Creasy, 2 East, 92; Tapp *v.* Lee, 3 Bos. & Pull. 367; and see Holmes *v.* Custance, 12 Ves. jun. 279.

So a purchaser, by a defective conveyance, will be relieved against persons who did not consider the land as their original or primary security; although they may have obtained an advantage at law (*a*).

And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser.

But it seems to have been considered that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract (*b*). This opinion, however, deserves great consideration.

Where the conveyance is not perfected with the solemnities positively required by an act of parliament, as in the case of the ship-registry acts, equity cannot relieve, as it would be against the policy of the acts, unless perhaps there were direct fraud, in which case it should seem that equity would relieve (*c*).

It has been said, that every person who takes an assignment of a *chose* in action gives personal confidence that there is no lien upon it (*d*). Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the Profession to require notice of the sale to be given to the trustee. This of course binds his conscience. And notwithstanding the general rule that, with respect to equitable rights, *qui prior est tempore*

(*a*) Burgh *v.* Francis, Finch, 28; and see Gilb. For. Rom. 223.

(*b*) Morse *v.* Faulkner, 1 Anstr. 11; Carleton *v.* Leighton, 3 Mer. p. 667. See Bensley *v.* Burdon, 2 Sim. & Stu. 516, upon appeal affirmed; but the principal point upon estoppel has since been properly overruled.

(*c*) Speldt *v.* Lechmere, 13 Ves. jun. 588; *ex parte* Yallop, 15 Ves. jun. 60. See *ex parte* Wright, 1 Rose, 308.

(*d*) *Per* Lord Thurlow, in *casu* Davies *v.* Austen, 1 Ves. jun. 247.

potior est jure (*e*), it seems probable that equity would prefer a subsequent purchaser who had given a proper notice to the trustee to a prior purchaser who had neglected to do so. At least there is a case (*f*) which seems, in some measure, to authorize this conclusion.

Since these observations were published, this point has been elaborately discussed in several cases. Sir Thomas Plumer held that priority in time must prevail, and that mere neglect of notice was not sufficient to postpone a purchaser. In order to deprive him of his priority, it was necessary that there should be such laches as in a court of equity amounted to fraud (*g*). This decision the learned Judge forgot (and the bar was not aware of it) upon the discussion in two subsequent cases (*h*), in which the same learned Judge decided that the purchaser who had alone made inquiry, and given notice, was to be preferred over the prior purchaser, although he had simply neglected to give notice. And these decisions were affirmed upon appeal by the Lord Chancellor; so that a prior purchaser who has not given notice will be postponed to a subsequent purchaser who has.

It may be laid down as a general rule, that a purchaser of a *chose* in action (*i*), or of any equitable title (*k*), must always abide by the case of the person from whom he buys, and will be entitled to all the remedies of the seller (*l*). And yet as we have seen (*m*), there may be

(*e*) See Tourville *v.* Naish, 3 P. Wms. 307; and see 2 P. Wms. 495; 15 Ves. jun. 354; 2 Taunt. 415.

(*f*) Stanhope *v.* Earl Verney, Butler's n. (1) to Co. Litt. 290, b.; and see 1 Ves. 367; 9 Ves. jun. 410; but see Frere *v.* Moore, 8 Pri. 475, the facts of which do not appear to have been ascertained.

(*g*) Cooper *v.* Tynman, 3 Russ. 60.

(*h*) Dearle *v.* Hall, Loveridge *v.* Cooper, 3 Russ. 1.

(*i*) Davies *v.* Austen, *ubi sup.*; Turton *v.* Benson, 2 Vern. 764; Priddy *v.* Rose, 3 Mer. 86; Hamil *v.* Stokes, 4 Price, 161.

(*k*) Whitfield *v.* Fausset, 1 Ves. 387.

(*l*) See *ex parte* Lloyd, 17 Ves. jun. 245.

(*m*) George *v.* Milbanke, 9 Ves. jun. 190; *supra*, vol. ii. p. 169.

a case in which a purchaser of a *chose* in action, merely by sustaining that character, will be in a better situation than the person was of whom he bought. And it seems, that where a person purchases a specific legacy, delivered to the legatee by the executor, if there is a deficiency of assets, the creditors must follow their demand in reasonable time, or equity will not assist them, otherwise legacies would be eternally locked up, and creditors encouraged in their laches, and to call on purchasers of legacies to refund at a great length of time (*n*).

So if trustees suffer a tenant for life of a renewable leasehold to enjoy all the profits in breach of a trust reposed in them to renew out of the rents and profits, the assets of the tenant for life will be applicable in the first instance to their indemnity, and a purchaser from the tenant for life of his life-interest, will also, it seems, be answerable to the person for whose benefit the renewal ought to have been made. But, as between the trustees and the purchaser, the latter is not primarily answerable. If they permit the tenant for life to apply to his own use all the rents and profits, and abstain from performing the trust, they cannot contend that it was the purchaser's duty to withold any part of the rents and profits, or the consideration that came in place of them (*o*).

Where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case the aid of a court of equity is required to relieve against the purchase (*p*).

And even supposing the Court to be unwilling to make

(*n*) Cholmondley *v.* Orford, Ch. H. T. 1 58, MS.

(*o*) Ld. Montford *v.* Ld. Cadogan, 17 Ves. jun. 485.

(*p*) Edlin *v.* Batalay, 2 Lev. 152; Peterson *v.* Hickman, 1 Cha. Rep. 3, cited; Whalley *v.* Whalley, 1 Vern. 484; Savage *v.* Taylor, For. 234; Baugh *v.* Price, 1 Wils. 320; *ex parte* Hughes, 6 Ves. jun. 617; *ex parte* James, 8 Ves. jun. 337; Browne *v.* Odea, 1 Scho. & Lef.

an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insists to have the account taken according to the present value, the Court will compel him to make an allowance for repairs and improvements (*q*).

If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it. If a different rule should prevail, it would certainly, as Lord Clare remarked, fully justify a proposition once stated at the bar of the Court of Chancery in Ireland, that it was a common equity to improve the right owner out of the possession of his estate. However, if the sums are large, that circumstance may influence the Court in decreeing an account from the time of filing the bill only, and not from the time of taking possession (*r*).

But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements; but must dismiss a bill for that purpose with costs (*s*).

Where a person purchases with notice of an incumbrance, although he pay off some to which that incumbrance was posterior, yet he lets it in as the first

115; and see 9 Mod. 412; Barnard. Cha. Rep. 450; 1 Vern. 159; Shine *v.* Gough, 1 Ball & Beatty, 444.

(*q*) Thomlinson *v.* Smith, Finch, 378.

(*r*) Kenny *v.* Browne, 3 Ridgw. P. C. 518.

(*s*) See Needler *v.* Wright, Nels. Cha. Rep. 57; but see Peterson *v.* Hickman, 1 Cha. Rep. 3, cited. This case, probably, turned on the fraud in the wife standing by while the improvements were made, without giving notice of her claim to the tenant.

incumbrance on the estate, and cannot, as against that incumbrance, claim the benefit of the prior incumbrances which he has paid off (*t*).

And if a mortgagee would avail himself of prior incumbrances which he pays off against subsequent subsisting ones, he should actually keep on foot those which he pays off, and not allow them to be extinguished (*u*). The distinction is a very subtle one.

It seems, that where two persons claim a reversion, to which only one can be entitled, a bill will lie to perpetuate testimony, although both of them are purchasers, or only one of them is a purchaser (*x*); for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony, which might be had at that time if the circumstances called for it (I).

II. Thus have we seen how peculiarly a *bonâ fide* purchaser without notice is favoured and protected by equity. But if a purchaser have notice of any claim, or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favour, but will assist the claimant or incumbrancer in establishing his claims against him; his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily, and of his own free will (*y*). And it may be laid down as

(*t*) Toulmin *v.* Steere, 3 Mer. 210. This case was appealed from; but the appeal was stopped by a relation of the appellants, who chose to pay off the incumbrance.

(*u*) Parry *v.* Wright, 1 Sim. & Stu. 369; affirmed upon appeal by the L. C., 5 Russ. 142, *sed qu.*

(*x*) See Lord Dursley *v.* Fitzhardinge, 6 Ves. jun. 251.

(*y*) See 3 Atk. 238; Fitz. T. Subpœna, pl. 2.

(I) But note, the point was not settled, and it does not seem quite clear what determination it would receive; as retaining such a bill is evidently granting relief against a purchaser.

a general rule, that a purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased (*z*). Thus, suppose trustees for preserving contingent remainders to join in destroying them, and to convey the estate to a purchaser, if the purchaser buy for a valuable consideration, and without notice, he cannot be affected. But if he buy with notice of the trust, although for a valuable consideration, he must convey the estate to the uses of the settlement (*a*).

But we may here observe, that it is at last settled, that trustees joining in a recovery after the first tenant in tail is of age, is not a breach of trust, and therefore a purchaser may safely buy under the title acquired by the recovery (*b*). This point cannot arise upon new titles, for, as we have seen, fines and recoveries are abolished, and the protector of a settlement cannot commit a breach of trust in joining with the tenant in tail in barring the remainders (*c*).

A purchaser will be bound, even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed (*d*).

But where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance, although with full notice, yet he will not be bound by the agreement.

(*z*) Winged *v.* Lefebury, 1 Eq. Ca. Abr. 32, pl. 43; Jackson's case, Lane, 60; Gore *v.* Wiglesworth, cited, *ibid*; Earl Brook *v.* Bulkeley, 2 Ves. 498; Taylor *v.* Stibbert, 2 Ves. jun. 437; Lord Verney *v.* Carding, 1 Scho. & Lef. 345, cited; Crofton *v.* Ormsby, 2 Scho. & Lef. 583; Dunbar *v.* Tredennick, 2 Ball & Beat. 304.

(*a*) Mansell *v.* Mansell, 2 P. Wms. 678.

(*b*) Biscoe *v.* Perkins, 1 Ves. & Bea. 485. The Lord Chancellor has since decided the same point in the same way.

(*c*) 3 & 4 W. 4, c. 74; *supra*, vol. i. 193, 194, 356, 359, 380; ii. 246.

(*d*) Dean *v.* Cartwright, 4 East, 29.

This was decided in a recent case, where a copyholder granted a lease to one Luffkin for a year, and so from year to year, if the lord would give a licence. The lord of the manor purchased the reversion himself, and took a surrender in the name of a trustee. The terms of the demise were correctly stated in the abstract of the title; the agreement contained an exception of all subsisting leases (if any there were), and in a deed from the vendor to the purchaser's trustee, there was an exception in the covenant against incumbrances "of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the premises." After the purchase, the lord gave notice to his trustee, that he would not grant any licence to any copyholder of his manor to demise. The trustee then gave notice to Luffkin to quit, and brought an ejectment, in which he recovered, the Court of King's Bench being of opinion that the lease did not operate as a lease for fourteen years (*e*). Then Luffkin filed a bill against the trustee and the lord for a specific performance, on the ground of the lord having notice of the lease, and of its being excepted in the contract, &c. A case was directed to the Court of Common Pleas, who held, first, that the lease was not a lease for fourteen years; and secondly, that the tenant had no remedy on the covenant in the lease for quiet enjoyment (*f*). The cause then came on upon the equity reserved, and was fully argued by Romilly for the plaintiff, and by Hollist and Bosanquet for the defendants. And Lord Eldon, after taking a day to consider, pronounced judgment shortly, that there was not equity sufficient to support the bill (*g*).

This decision demands particular attention. It seems founded on great principles of equity, although the purchaser had voluntarily placed himself in a situation in

(*e*) Doe *v.* Luffkin, 4 East, 221.
(*f*) 1 New Rep. 163.
(*g*) Ch. 15th July 1805. S. C. 11 Ves. jun. 170.

which it was his interest to refuse his consent, without which the lease could not be sustained. We cannot fail to distinguish this case from that where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant; and then joins with the remainder-man in selling the estate to a purchaser, with full notice of the agreement. There equity rightly holds the purchaser bound by the agreement. The vendor was bound to grant the lease, or to answer in damages for non-performance of the agreement; and as the purchaser had notice of the contract, and takes an estate which enables him to perform it, it is but just that he should be compelled to do so, in order to exonerate the vendor from an action for breach of the contract. And on this ground it should seem, that if in the case of Luffkin *v.* Nunn, Luffkin could have recovered on the covenant for quiet enjoyment, the lord would have been compelled to perform the agreement. If this had not been Lord Eldon's opinion, he would not have asked the Court of Common Pleas, whether Luffkin could recover on the covenant for quiet enjoyment in case he were evicted. Lord Redesdale appears to have overlooked this distinction, when in a late case he found fault with one point in the case of Taylor *v.* Stibbert, viz. that he thought the purchaser had a right to say, that having purchased from the son as well as the father, *and the covenant not being binding on the son's estate,* he should not be bound further than as he purchased an estate which was bound, and therefore that notice, or no notice, was of no consequence to him (*h*). The doctrine, however, can only apply to cases where the purchaser ought to indemnify the seller against the agreement.

Where a purchaser buys a reversion expectant upon

(*h*) See 2 Scho. & Lef. 599.

a particular estate, as, subject to the life-estate of *I. S.*, although it turn out that no such estate is in existence, yet *I. S.* will be decreed to hold the estate during his life, against the purchaser (*i*).

There was a case decided in Ireland, where the purchaser set aside the leases subsisting at the time of the sale, and he was decreed to be a trustee for the vendor (*k*). And it was treated as clear, that if an estate be sold subject to existing leases, and the vendor discover that the leases he had granted were obtained from him by fraud, he would be entitled to set them aside, and to hold the estate during the continuance of such leases, paying the rents to the purchaser thereby reserved, and performing the covenants in the leases (*l*). And upon this principle, where a devisee in fee, subject to an executory devise over in fee, suffered a recovery, and sold the estate, and received all the money, and he and the devisee over joined in the conveyance (which of course operated as a release of the executory interest), subject to leases granted by the first devisee, it was decided that the devisee over (the event having happened upon which it was to arise) was entitled to impeach the leases for his own benefit, securing to the purchaser the rents and the benefits of the agreements (*m*).

But all these points are of great importance, and will require, it is apprehended, much further consideration before they can be adopted as binding rules.

Although whilst fines operated a purchaser with notice had to strengthen his estate, levied a fine, and five years had passed without a claim, yet the fine and nonclaim would have been inoperative; for as he purchased with

(*i*) Walton *v.* Stanford, 2 Vern. 279. See Doe *v.* Archer, 1 Bos. & Pull. 531.

(*k*) 2 Ball & Beat. 548.

(*l*) 2 Ball & Beat. 547.

(*m*) Maguire *v.* Armstrong, 2 Ball. & Beat. 538; see Blakeney *v.* Bagott, 3 Bligh, N. S. 248.

notice, notwithstanding any consideration paid by him he was but a trustee, and so the estate not being displaced, the fine could not bar (*n*); so, although a man purchase under a decree in equity, yet, if the decree was obtained by fraud, he cannot protect himself (*o*).

But where it was a mere legal title, and a man had purchased an estate which he saw himself had a defect upon the face of the deeds, yet the fine would have been a bar, and not affect him with notice, so as to make him a trustee for the person who had the right, because this would be carrying it much too far, for the defect upon the face of the deeds was often the occasion of the fine being levied. This was laid down by Lord Hardwicke (*p*). And it was resolved in Fermor's case (*q*), that if *A* purchases land of *B*, and afterwards perceiving that *B* had but defeasible title, and that *C* had a right to it, *A* (I) levies a fine with proclamations to a stranger, or takes a fine from another with proclamations, with the intent to bar the right of *C*; this fine, so levied by consent, should bind, for nothing was done in this case which was not lawful. Fines cannot in future be levied; but still with reference to existing titles, it is necessary to know what the rule was. The accepting a release of a right is in no case an acknowledgment that a right existed. If it were an admission of right, it must always be liable to objections, because the consideration for the release is always much less than the value of the thing demanded; but in truth, the consideration given being less than the value of the thing demanded, the transaction

(*n*) 1 Vern. 149; 2 Atk. 631; Kennedy *v.* Daly, 1 Scho. & Lef. 355.

(*o*) Kennedy *v.* Daly, 1 Scho. & Lef. 335; Giffard *v.* Hort, *ib.* 386.

(*p*) 2 Atk. 631; and see *ib.* 390.

(*q*) 3 Rep. 79, a.

(I) *B* is by mistake inserted in the report for *A*.

amounts to a denial of the right, instead of an acknowledgment (*r*).

Notice, before actual payment of all the money, although it be secured (*s*), and the conveyance actually executed (*t*), or before the execution of the conveyance, notwithstanding that the money be paid (*u*), is equivalent to notice before the contract.

But if the conveyance be executed, and the money paid, a purchaser will not be affected by notice of an incumbrance, although a prior incumbrance, intended to be discharged, is not paid off (*v*).

And notice at the time of getting in a precedent incumbrance, as a protection against mesne charges, is not material, so that he had not notice at the time of the purchase (*w*). Indeed, after a conveyance is executed, it is seldom that a purchaser thinks of procuring a prior legal estate, unless he discovers some incumbrance on the estate, against which he is anxious to protect himself.

But although a purchaser has notice of an equitable claim by which his conscience is affected, yet a person purchasing from him *bonâ fide*, and without notice of the right, will not be bound by it (*x*).

So, on the other hand, a person with notice of an equitable claim, may safely purchase of a person who bought *bonâ fide*, and without notice of it (*y*); although this

(*r*) Underwood *v.* Lord Courtown, 2 Scho. & Lef. 68.

(*s*) Tourville *v.* Naish, 3 P. Wms. 307; Story *v.* Ld. Windsor, 2 Atk. 630; More *v.* Mayhew, 1 Cha. Ca. 34; 2 Freem. 175, pl. 235.

(*t*) Jones *v.* Stanley, 2 Eq. Ca. Abr. 685, pl. 9.

(*u*) Wigg *v.* Wigg, 1 Atk. 384.

(*v*) Meynell *v.* Garraway, Nels. Cha. Rep. 63.

(*w*) Cockes *v.* Sherman, 2 Freem. 13; and see 2 Ves. 574.

(*x*) Ferrars *v.* Cherry, 2 Vern. 384; Mertins *v.* Joliffe, Ambl. 313; Lowther *v.* Carleton, MS. Barnard. Rep. Cha. 358; Forrester, 187; 2 Atk. 242. See Pitts *v.* Edelph, Toth. 284.

(*y*) Harrison *v.* Forth, Prec. Cha. 51; 1 Eq. Ca. Abr. 331, pl. 6; Brandling *v.* Ord, 1 Atk. 571; Sweet *v.* Southcote, 2 Bro. C. C. 66; 2 Dick. 671; Lowther

circumstance may influence the Court with respect to costs (z) (I). This rule is consistent with the others; it is not in favour of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate.

It still remains to show what will be deemed sufficient notice to a purchaser; but the importance of this subject seems to demand a separate chapter.

v. Carleton, 2 Atk. 242; Andrew v. Wrigley, 4 Bro. C. C. 125.

(z) Andrew v. Wrigley, 4 Bro. C. C. 125.

(I) In Grounds and Rudiments of Law and Equity, p. 275, tit. 377, Lord Talbot is erroneously stated to have held in Lowther v. Carleton, that where a purchaser with notice conveys to another without notice, the second sale was vicious, because of the former conveyance being with notice; and the author of that book warmly espouses the doctrine.

CHAPTER XVII.

OF NOTICE.

NOTICE is either actual or constructive; but there is no difference between actual and constructive notice in its consequences (*a*).

I. Of actual notice little can be said. It requires no definition, and it need only be remarked, that, to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase. Vague reports from persons not interested in the property, will not affect the purchaser's conscience; nor will he be bound by notice in a previous transaction which he may have forgotten.

That vague reports from strangers are not notice, was decided in the case of Wildgoose *v.* Weyland (*b*), where one man came to a person about to buy a house, and told him to take heed how he bought it, for the vendor had nothing in it, but upon trust for *A*: and another person came to him, and told him it was not so, for the vendor was seised of the land absolutely. The information of the first proved correct, yet the purchaser was held not to have notice: because such flying reports were many times fables, and not truth; and if it should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

And not only a mere assertion, that some other person claims a title is not sufficient, but, perhaps, a general

(*a*) See Ambl. 626.

(*b*) Goulds, 147, pl. 67; and Cornwallis's case, Toth. 254.

claim is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge (*c*).

However, no person could be advised to accept a title concerning which there were any such reports, or assertions, without having them elucidated; because what one Judge might think a flying, vague report, or a mere assertion, another might deem a good notice. For instance, in Fry *v.* Porter (*d*), Hale, C. B. in speaking of the point of notice in that case (which, however, did not relate to a purchaser), said, "here are several circumstances that seem to show there might be notice, and a *public voice in the house*, or an *accidental intimation*, &c. may possibly be sufficient notice."

That the notice to the purchaser must be in the same transaction, seems to have been settled in a case (*e*), upon the statute of charitable uses (*f*), the facts of which were, that land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in parliament, it was declared, that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the House, who spoke in the debate on the bill; yet this notice was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament.

It may be here proper to mention, that an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or

(*c*) See Jolland *v.* Stainbridge, 3 Ves. jun. 478.

(*d*) 1 Mod. 300. See Butcher *v.* Stapely, 1 Vern. 363.

(*e*) See East Greenstead's case, Duke, 64; and the cases *infra*, as to notice to an agent. See 1 Ves. jun. 425.

(*f*) *Supra*, vol. 2. p. 182.

to any person about to buy the estate; although the sale be thereby prevented (*g*); and to sustain the action, malice in the defendant must be proved (*h*).

Nor will the action lie against the attorney, although he do not deliver the precise message of his principal, provided it to be the same effect.

II. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted (*i*); but it is difficult to say what will amount to constructive notice. The following rules may, perhaps, assist the learned reader in his researches.

1. Notice to the counsel, attorney, or agent of the purchaser, is notice to him (*k*); for otherwise, as Lord Talbot observed, a man who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him who had notice of a former title; which would be a manifest cheat (*l*). And the same rule prevails, although the counsel, attorney or agent, be the vendor (*m*), or be concerned for both vendor and purchaser (*n*).

So notice to the town agent of the purchaser's attorney in the country, is also notice to the purchaser (*o*).

And it is immaterial that the purchase is made under

(*g*) Hargrave *v.* Le Breton, 4 Burr. 2422.

(*h*) Smith *v.* Spooner, 3 Taunt. 246. See Rowe *v.* Roach, 1 Mau. and Selw. 304; Pitt *v.* Donovan, *ib.* 639; Robertson *v.* M'Dougall, 4 Bingh. 670.

(*i*) See 2 Anstr. 438; *per* Eyre, C. B.

(*k*) Newstead *v.* Searles, 1 Atk. 265; Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves, 64; Brotherton *v.* Hatt, 2 Vern. 574; Ashley *v.* Baillie, 2 Ves. 368; Maddox *v.* Maddox, 1 Ves. 61; and see 3 Cha. Ca. 110; Tunstall *v.* Trappes, 3 Sim. 301.

(*l*) Attorney-General *v.* Gower, 2 Eq. Ca. Abr. 685, pl. 11. See Ambl. 626.

(*m*) Sheldon *v.* Cox, Ambl. 624.

(*n*) Le Neve *v.* Le Neve, 3 Atk. 646.

(*o*) Norris *v.* Le Neve, 3 Atk. 26.

the direction of a court of equity; and infants are equally bound with adults (*p*).

And if a person, with notice of any claim, purchase an estate in the name of another, without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent (*q*). So a man cannot elude the effect of having notice, by procuring the conveyance to be made to a third person (*r*).

But although, if a man purchase an estate which is subject to an equity only, of which he or his agent has notice, it is a fraud; yet, if an instrument is signed by all parties, the intention cannot be interpreted, contrary to such instrument, by notice to an agent, that some of the parties had such intention (*s*).

Although the counsel, attorney or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in the case of Vane *v.* Lord Barnard (*t*); but in the later case of Bury *v.* Bury, before Lord Hardwicke (*u*), he said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."

The notice to the counsel, attorney or agent, must, however, be in the same transaction; because he may very easily have forgotten it (*v*); and if this were not the rule

(*p*) Toulmin *v.* Steere, 3 Mer. 210. A petition for rehearing was presented, which was afterwards withdrawn under circumstances not connected with the legal points in the case.

(*q*) Merry *v.* Abney, 1 Cha. Ca. 38; 1 Eq. Ca. Abr. 330; 2 Freem. 151; Nels. Cha. Rep. 59; Jennings *v.* Moore, 2 Vern. 609; 1 Bro. P. C. 244.

(*r*) Coote *v.* Mammon, 5 Bro. P. C. by Tomlins, 355.

(*s*) See 1 Bro. C. C. 351.

(*t*) Gilb. Eq. Rep. 6. See 2 Pow. Mort. 597, 598, 4th edit.

(*u*) Chan. 11th July 1748, MS. Appendix, No. 27.

(*v*) Preston *v.* Tubbin, 1 Vern. 286; Fitzgerald *v.* Fauconberge, Fitzgib. 297; 2 Eq. Ca. Abr. 682, (D.) n. (b.); Warwick *v.* Warwick,

of the Court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind (*x*). The same rule of course applies to the purchaser himself. If a man purchases an estate, under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase (*y*).

2. A public act of parliament binds all mankind; but a private act of parliament is not, of itself, notice to a purchaser (*z*). And it is conceived, that an act of parliament of a private nature, but made a public act (I), in order that it might be judicially taken notice of, instead of being specially pleaded, and to save the expense of an attested copy, would not be deemed such a public act as to be, of itself, notice to a purchaser (*a*).

3 Atk. 291; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Steed *v.* Whitaker, Barnard. Cha. Rep. 220; Hine *v.* Dodd, 2 Atk. 275; Lowther *v.* Carleton, 2 Atk. 242, S. C. MS.; Ashley *v.* Baillie, 2 Ves. 368. See 1 Ves. 435.

(*x*) *Per* Lord Hardwicke, 2 Atk. 242.

(*y*) Hamilton *v.* Royse, 2 Scho. & Lef. 327. *Per* Lord Redesdale; Mountford *v.* Scott, 3 Madd. 34.

(*z*) See 2 Ves. 480.

(*a*) See 3 Bos. & Pull. 578.

(I) This will not happen in future, for it has been resolved that a *private* act shall not be made a public act; but it may be enacted, that the act shall be printed by the king's printer, and that a printed copy of it shall be evidence.

3. *Lis pendens* is of itself notice to a purchaser (*b*), unless it be collusive, in which case it will not bind him (*c*), but it is not of itself notice for the purpose of postponing a registered deed (*d*).

A *subpœna* served, is not, however, a sufficient *lis pendens* unless a bill be filed (*e*); but when the bill is filed, the *lis pendens* begins from the service of the *subpœna*. And the question must relate to the estate, and not merely to money secured upon it (*f*); but a bill to perpetuate the testimony of witnesses and to establish a will, is a sufficient *lis pendens* (*g*).

To affect a purchaser, it has been said that there ought to be a close and continued prosecution of the *lis pendens* (*h*), and this is required by Lord Bacon's rule. In a late case (*i*), the Master of the Rolls cited the following passage from Lord Nottingham's prolegomena of equity: "The Lord Bacon, in his 12th rule, seems to direct, that if a purchase is made *pendente lite*, after some long intermission, this case shall differ from the common case. But the rule, though reasonable, is not always observed; for in Martin *v.* Stiles, 1663, the bill filed in 1640, abated by the death in 1648: a bill of revivor was filed in 1662; and the purchase was in 1651; and yet the purchaser was bound, because now, by relation of the bill of revivor, it

(*b*) See Toth. 45; Yeavely *v.* Yeavely, Toth. 227; 3 Cha. Rep. 25; Digs *v.* Boys, Toth. 254; Culpepper *v.* Ashton, 2 Cha. Ca. 116. 233; Barns *v.* Canning, 1 Cha. Ca. 300; Sorrell *v.* Carpenter, 2 P. Wms. 482; and see 3 P. Wms. 117; Garth *v.* Ward, 2 Atk. 174; 3 Barnard. Rep. Cha. 450; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Walker *v.* Smalwood, Ambl. 676; 5 Co. 47, b.; Hill *v.* Worsley, Hard. 320; Goldson *v.* Gardiner, 1 Vern. 459, cited; the Bishop of Winchester *v.* Paine, 11 Ves. jun. 194.

(*c*) 2 Cha. Ca. 116.

(*d*) 19 Ves. jun. 439.

(*e*) Anon. 1 Vern. 318.

(*f*) Worsley *v.* Earl of Scarborough, 3 Atk. 392.

(*g*) Garth *v.* Ward, 2 Atk. 174.

(*h*) Preston *v.* Tubbin, 1 Vern. 286.

(*i*) Bishop of Winchester *v.* Paine, 11 Ves. jun. 194; see Kinsman *v.* Kinsman, 1 Taml. 399.

was *pendente lite: per* Clarendon, Chancellor." This passage was cited as an authority, that a purchaser during the abatement of the suit is bound in like manner as if the suit was in full prosecution. But the learned Judge by whom it was quoted, treated this as a case of great difficulty, notwithstanding the authority of Lord Nottingham. Indeed, the case referred to seems to depend too much on its own circumstances and the times in which it occurred, to serve as a precedent. The Lord Keeper expressly said, that the war and infancy excused the laches. Besides, it appears that the person who came in *pendente lite* did not claim by purchase for money, but under the will of the person against whom the original bill was filed (*k*). If the point should ever call for a decision, it will probabably turn on the question, whether the plaintiff was guilty of laches in reviving the suit.

Lord Redesdale appears to have held, that although a bill is dismissed, yet a party, purchasing after the dismissal, was a purchaser *pendente lite*, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was *rightly* dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences; but it was not necessary to decide whether such a purchase was by force of the supposed *lis pendens* made with implied notice of the adverse title (*l*).

A purchaser *pendente lite*, on filing his supplemental bill, goes into the Court *pro bono et malo*, and will be liable to all the costs in the proceedings, from the beginning to the end of the suit (*m*); and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings (*n*).

(*k*) Style *v.* Martin, 1 Cha. Ca. 150.

(*l*) 1 Dow, 31.

(*m*) See 1 Atk. 89; and Gaskell *v.* Durdin, 2 Ball & Beatty, 167.

(*n*) Finch *v.* Newnham, 2 Vern. 216.

Relief being sought against a *bonâ fide* purchaser who bought *pendente lite*, without actual notice, is, however, considered a hard case in equity; and although the Court cannot refuse its aid against him, yet the plaintiff is by no means a favourite; and therefore if he make a slip in his proceedings, the Court will not assist him to rectify the mistake (*o*).

The mere pendency of a suit will not prevent the defendant from selling the property, the subject of the suit, but the purchase will, in no manner, affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser, if he obtain a transfer of the *legal* estate (*p*). If, however, the plaintiff have only a defeasible estate, the defendant may exercise his right to put an end to it, notwithstanding the pendency of the suit.—Therefore, if a man make a voluntary settlement, and the person claiming under it file a bill against the settlor, to have the trusts performed, yet the defendant may defeat the plaintiff's right by selling the estate to a purchaser during the pendency of the suit. The same observation applies to a settlement with a power of revocation. The settlor, the defendant, may revoke the settlement, although a suit is depending for carrying it into execution (*q*).

4. Decrees of the courts of equity are not of themselves notice to a purchaser (*r*).

This was expressly decided in Worsley *v.* the Earl of Scarborough (*s*); in which case it appears, by a manu-

(*o*) Sorrell *v.* Carpenter, 2 P. Wms. 482.

(*p*) Metcalfe *v.* Pulvertoft, before the Vice-Chancellor, 10th August 1813. See 1 Ves. & Beam. 180; 2 Ves. & Beam. 200.

(*q*) S. C.

(*r*) See Toth. 45; *Prac. Reg.* Cha. 125; and see Sir Thomas Harvey *v.* Montague, 1 Vern. 57. 122.

(*s*) 3 Atk. 392; and see Rivers *v.* Steele, *Lib. Reg.* U. 128; temp. Lord Hardwicke, referred to by Mr. Coxe. Note, owing to the generality of the reference, I could not find this case in the register's book.

script note of the late Mr. Coxe's to the case of Preston *v.* Tubbin, in his copy of Vernon, in Lincoln's-Inn Library, that Lord Hardwicke held most decidedly, that decrees were not notice. He said there was no such doctrine, that men were to take notice of the decrees of this Court, though they were to take notice of a *lis pendens*. In Sorrel *v.* Carpenter (*t*), it was said by Lord Chancellor King, that the Court will oblige all to take notice of its decrees as much as of judgments. This *dictum* is frequently quoted as an authority to prove that the decrees of equity are notice to purchasers; but it was only an *obiter dictum*; and, indeed, as judgments are not of themselves notice to a purchaser, it does not appear to affect the question. At first sight, the case of Wortley *v.* Birkhead (*u*), seems to militate against the doctrine, but on examination, it will be found not to disturb it; that case having only settled, that after a decree, and directions to settle the priority of the demands, a puisne incumbrancer cannot take the first incumbrance, and thereby gain a preference to the second: *as it would lay a foundation for the greatest collusion and contrivance between the parties to exclude each other.*

Decrees, however, which do not put an end to the suit, as decrees to account, are of themselves notice to a purchaser (*v*); because the *lites pendentes* are not thereby terminated.

In Kinsman *v.* Kinsman (*x*), a testator, who died in 1780, devised one estate to William for life, remainder to his son, an infant, in tail, and another estate to Simon for life, remainder to his sons in tail. By a decree in 1792, in a creditor's suit, it was directed, that if the personal estate were insufficient for the payment of the debts,

(*t*) 2 P. Wms. 482.
(*u*) 2 Ves. 571.
(*v*) Worsley *v.* Earl of Scarborough, 3 Atk. 392.
(*x*) 1 Russ. & Myl. 617.

the *two* estates should contribute thereto in proportion to their respective value; and in 1798, upon further directions, the *two* estates were ordered to be sold. William's estate was sold, but Simon concealed the title-deeds of the estate devised to him, and consequently it could not be sold for want of a title. In 1798, upon a second set of further directions, the debts were paid out of the purchase-money for William's estate, and the Master reported what proportion of the debts and costs ought to be borne by Simon's estate. William, who was a day-labourer, took no further step, and died in 1825. Simon being left in possession of the estate devised to him, he and his son sold it in 1824 to a *bonâ fide* purchaser, without notice. William's son, shortly after his father's death, filed a supplemental bill, to make the estate sold by Simon bear its share of the burden. The Master of the Rolls made a decree accordingly, stating that at the time of the sale there was plainly a *lis pendens*, which amounted to an equitable charge. Upon an appeal from this decree by the purchaser from Simon, it was reversed by the present Lord Chancellor, who held that there was not such a *litis pendentia* at the time when the purchase was made as the purchaser was bound to take notice of.

5. The docketing of judgments is not of itself notice to a purchaser (*y*); for, as Lord Talbot observed, judgments are infinite (*z*).

6. Registration of deeds is not of itself notice to a purchaser who was seised of a legal estate at the time of the purchase.

If a man search the register he will be deemed to have notice (*a*); but if a search is made for a particular period,

(*y*) Snelling *v.* Squint, 2 Cha. Ca. 47; Greswold *v.* Marsham, 2 Cha. Ca. 170. See Ambl. 154; Churchill *v.* Grove, 1 Cha. Ca. 37; 2 Freem. 176.

(*z*) 2 Eq. Ca. Abr. 682, (D.) n. (b.)

(*a*) Bushell *v.* Bushell, 1 Sch. & Lef. 103.

the purchaser will not by the search be deemed to have notice of any instrument not registered within that period. This was decided in Hodsgon *v.* Dean (*b*). where a mortgagee directed a search to be made by the deputy-register for York from 1794, and the plaintiff's claim to an equitable estate arose under a settlement of 1755, registered in that year; and it was held that the limited search excluded the presumption of a general search, and that the mortgagee was not bound by constructive notice of the registered deed.

7. Neither an act of bankruptcy (*c*), nor a commission of bankruptcy (*d*), is notice to a purchaser.

Indeed, a decision, that an act of bankruptcy was of itself notice to a purchaser, would have operated as a repeal of the provision in the statute of James, in favour of purchasers from bankrupts. For, as we have already seen, a purchaser, with notice of the act of bankruptcy, cannot take advantage of the statute (*e*) (I).

Upon the general rule in equity in favour of purchasers, and upon the ground that an act of bankruptcy is not of itself notice to a purchaser, Lord Talbot, in the case of Collet *v.* De Gols (*f*), decided, that if a mortgage of a legal estate be made *before* an act of bankruptcy, and the mortgagee make further advances *after* the act of bank-

(*b*) 2 Sim. & Stu. 221, affirmed by the Lord Chancellor, July 1825, MS.

(*c*) Wilker *v.* Bodington, 2 Vern. 599; Anon. 2 Cha. Ca. 136; Collet *v.* De Gols, For. 65; and see 4 Burr. 2425; *ex parte* Knott, 11 Ves. jun. 609; but see p. 581.

(*d*) Hithcox *v.* Sedgwick, 2 Vern. 156; reversed in *Dom. Proc.* See Journals of the House of Lords, vol. xiv. p. 601; and see 7 East, 161. See also Sowerby *v.* Brooks, 4 Barn. & Ald. 523, where the Court was not aware of the reversal in *D. P.* of Hithcox *v.* Sedgwick.

(*e*) *Vide supra*, vol. 2. p. 184; and see now 6 Geo. 4, c. 16, s. 81. 83. 85, 86; *supra*, vol. 2. p. 186.

(*f*) For. 65.

(I) *Vide supra*, s. 3, which states the acts of Parliament.

ruptcy, but without notice, the assignees cannot compel a redemption without payment of *all* the money advanced, that is, that the mortgagee not having had notice, may make use of his prior legal estate as a protection against the commission of bankruptcy. Upon the same principle Lord Mansfield laid it down, that if an estate be purchased without notice of an act of bankruptcy, the purchaser may protect himself by a satisfied term prior to the act of bankruptcy still standing out (*g*).

In a case, however, before Lord Redesdale, in which Collet and De Gols was incidentally mentioned, he is said to have observed, that it is now the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy. He did not, however, express any opinion on the point (*h*). In a late case before Lord Eldon (*i*), in which this question was discussed, but did not call for a decision, his Lordship, in the course of the argument, said, " the case of Collet *v.* De Gols *proves* that money advanced after an act of bankruptcy may be tacked and charged upon the estate, notwithstanding the property is taken out of the bankrupt; and it was urged there, that he had nothing to convey by the second mortgage, yet it was held, that though the legal effect of the second mortgage is nothing, the Court will consider it a second incumbrance. The distinction was taken, that a secret act of bankruptcy does not prevent tacking, as a commission issued actually does, that being notice to all the world." In delivering judgment, he observed, " that it was said, the act divests the bankrupt of all his interest, and when the commission follows, it operates by relation from the time the act of bankruptcy was committed: unquestionably it does; and then the person taking the second security really takes nothing;

(*g*) 4 Burr. 2425.
(*h*) 1 Scho. & Lef. 152.
(*i*) *Ex parte* Knott, 11 Ves. jun. 609.

no interest passing from the bankrupt, and therefore shall not tack. *All the cases show that this objection will not do*, for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy, and after a commission issued. It follows of necessity that the law [*qu. effect*] is the same in both cases, for the operation of the commission is in either case precisely the same, reducing to dust and ashes the second security."

From these observations Lord Eldon's opinion appears to be, that Collett *v.* De Gols is still a binding authority. If it should be thought difficult to reconcile the last sentence with what precedes it, that must give way to what is before so clearly expressed. Perhaps, however, Lord Eldon intended merely to say, that though the *law* is different in these cases, *yet the effect* of the commission is the same whether it issued previously to the second mortgage, or subsequently to it, but upon a prior act of bankruptcy.

A case came before Lord Erskine, in which the precise point called for a decision. His Lordship considered Lord Eldon and Lord Redesdale as having both expressed their opinion against Collet *v.* De Gols, and he accordingly overruled it, and decided that a mortgagee could not tack advances subsequent to an act of bankruptcy, although made without notice, and the mortgagee had a prior legal estate (*k*).

This decision must, it should seem, prevent a purchaser who buys without notice of an act of bankruptcy, from availing himself of a prior legal estate as a protection against the commission; and yet it has always been considered clear, that a purchaser could not in such a case be disturbed. The cases, however, cannot be distinguished. The mortgagee was a purchaser *pro tanto*, and

(*k*) *Ex parte* Herbert, 13 Ves. jun. 183.

he, like a purchaser out and out, relied on his legal estate *prior* to the act of bankruptcy as a protection against the subsequent commission. But we have seen that it was taken from him.

The decision is open to much observation. It entirely subverts the established rule of equity, that a purchaser without notice shall not be relieved against, and an act of bankruptcy is not of itself notice. It proceeded, too, partly on an opinion attributed to Lord Eldon, but which, it should seem, he never entertained; and it escaped observation, that, as we shall shortly see, it had been decided in the House of Lords, that a mortgagee without notice may tack advances subsequently even to a *commission* of bankruptcy. That case must of necessity overrule all others, and the case of Collet *v.* De Gols may, therefore, be still thought to be a binding authority.

But where a purchaser claimed the benefit of Sir Samuel Romilly's act (*l*), a commission issued, although afterwards superseded, or a docket struck, would, by force of the statute, have been constructive notice to him of any prior act of bankruptcy. And now by the 6 Geo. 4, c. 16, s. 83 (*m*), the issuing of a commission shall be deemed notice of a prior act of bankruptcy (provided an act of bankruptcy has been actually committed before the issuing of the commission), if the adjudication shall have been notified in the Gazette, and the person to be affected by such notice may reasonably be presumed to have seen the same.

With respect to a commission of bankruptcy, it was, in Hithcox *v.* Sedgwick, held by Lords Commissioners Trevor and Hutchins, against Lord Commissioner Raw-

(*l*) *Vide supra*, vol. 2. p. 185.

(*m*) And see s. 85, 86; and *supra*, vol. 2. p. 190.

linson, that a *commission* of bankruptcy was notice to a purchaser; and that case is considered by the Profession as having settled that a commission of bankruptcy is of itself notice (*n*).

But it appears, that upon appeal to the House of Lords the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid the 2,200*l.* (*the money advanced after the commission issued*), with interest, costs and charges, as mortgagees are usually allowed; which was of course deciding that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. In the late Mr. Coxe's copy of Vernon, in Lincoln's-Inn Library, is a note to the case of Hithcox *v.* Sedgwick (which must have been written before the publication of the Lords Journals), in which he states, that Mr. I. Ord had told him the decree was reversed on appeal to the House of Lords as against Sedgwick, and that he (Ord) found it so said in a note of this case, taken by Lord Trevor, in which he says, the decree was so reversed; and that he was counsel on the appeal for Sedgwick.

8. What is sufficient to put a purchaser upon an inquiry is good notice (*o*); that is, where a man has sufficient information to lead him to a fact he shall be deemed conusant of it. Therefore, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is (*p*). So notice that the title-deeds are in another man's possession may be held to be notice of any equitable claim

(*n*) See For. 70; 9 Ves. jun. 28; 1 Pow. Mortg. 563, 4th edit.; Cooke's B. L. 628, 2d edit.; Cullen's B. L. 235: 2 Cruise's Dig. 250; *ex parte* Knott, 11 Ves. jun. 609.

(*o*) Smith *v.* Low, 1 Atk. 489; Taylor *v.* Baker, 1 Dan. 71.

(*p*) Anon. 2 Freem. 137, pl. 711.

which he may have on the estate, and as a security for which he held the deeds (*q*).

This doctrine has been carried so far, that notice that part of the estate was in possession of a tenant hath been holden to be notice of a lease, although the purchaser took it for granted that the tenant was only so from year to year (*r*). And if the tenant has even changed his character by having agreed to purchase the estate, yet his possession amounts to notice of his equitable title as purchaser (*s*); and consequently a subsequent purchaser, although without actual notice, will be considered as a purchaser of the seller's title, subject to the equity of the tenant, the first purchaser, to have the estate conveyed to him at the price which he had stipulated to pay to the seller. In such a case, therefore, a specific performance will be decreed in favour of the tenant against the seller, and the second purchaser, and they will be left to settle their rights between themselves (*t*). The cases have gone so far, that a purchaser cannot be advised to complete a contract for an estate not in the seller's own occupation without a communication with the tenants, in order to ascertain what their interests really are. So where a tenant had an interest under an agreement posterior to the lease under which he held, the purchaser was held to be bound by it, although he had not notice of it (*u*). But a purchaser, where the possession is vacant, is not bound to inquire of the late occupier what was the nature of his title, and therefore would not be held to have

(*q*) Hiern *v.* Mill, 13 Ves. jun. 114.

(*r*) See 2 Ves. jun. 440; 13 Ves. jun. 121.

(*s*) Daniels *v.* Davison, 16 Ves. 249; and see Crofton *v.* Ormsby, 2 Scho. & Lef. 583; Meux *v.* Maltby, 2 Swanst. 181; Powell *v.* Dillon, 2 Ball & Beatt. 416.

(*t*) 17 Ves. jun. 433.

(*u*) Allen *v.* Anthony, 1 Mer. 282.

implied notice of the information which he might have obtained by inquiry (*v*).

Where a man had made an equitable mortgage to *A*, and upon afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to *A* for money borrowed of him, this was held to be notice of the mortgage (*x*).

In a late case, where a charity-lease was sought to be set aside as improvidently made, upon the common equity, and it appeared that some of the parties stood in the character of purchasers, Lord Eldon said, though the purchaser of a lease has never been considered as a purchaser for valuable consideration, *without notice*, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length that the purchaser was to take notice of all those circumstances under which the lessor derived that title. Therefore, although the parties before the court must be understood at least to have notice that the lessors were trustees for a charity, yet he could not go the length that the purchasers had notice that the lease was bad; that depending on a number of circumstances dehors the lease (*y*).

But this of course, as in all other cases of notice, only prevails in equity; for although a purchaser has actual notice of a lease, yet if it be invalid, he may at law recover the possession from the lessee (*z*).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant

(*v*) Miles *v.* Langley, 1 Russ. & Myl. 39.

(*x*) Taylor *v.* Baker, 5 Price, 306.

(*y*) Attorney-General *v.* Backhouse, 17 Ves. jun. 293. See 3 Ridg. P. C. 512.

(*z*) Doe *v.* Luffkin, 4 East, 221.

who takes possession, and then the person having the legal estate sells to a person who purchases *bonâ fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession.

So a purchaser *bonâ fide* and without notice cannot be affected by the mere circumstance of the vendor having been out of possession many years. Thus, in a case (*a*) (I), where *A* covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made; and *A*, thirteen years afterwards, surrendered the same lands to *B* for valuable consideration, without notice of the covenant, *B* was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it (*b*); and for the same reason, if a purchaser has notice of a deed he is bound by all its contents (*c*).

(*a*) Oxwith *v.* Plummer, Bac. Abr. T. Mortgage, (E.) s. 3; 2 Vern. 636, S. C.

(*b*) Bisco *v.* Earl of Banbury, 1 Cha. C. 287; Moore *v.* Bennett, 2 Cha. Ca. 246; Ferrars *v.* Cherry, 2 Vern. 384; Drapers' Company *v.* Yardley, 2 Vern. 662; Mertins *v.* Joliffe, Ambl. 313; Bury *v.* Bury, Chancery, 11th July 1748, MS. Appendix, No. 27; and Coppin *v.* Fernyhough, 2 Bro. C. C. 291; S. P. *per* Lord Keeper Henley, in Howarth *v.* Powell, T. Vac. 1758, MS.; 1 Eden, 51, nom Howorth *v.* Deem; Malpas *v.* Ackland, 3 Russ. 273.

(*c*) Tanner *v.* Florence, 1 Cha. Ca. 259; Taylor *v.* Stibbert, 2 Ves. jun. 437; Hall *v.* Smith, MS. S. C.; 14 Ves. jun. 426; Daniels *v.* Davison, 16 Ves. jun. 249; which have overruled Philips *v.* Redhel, 2 Vern. 160, cited; where tenant for life sold as tenant in fee, and the very settlement at the

(I) From the report in Vernon, it seems that Lord Cowper thought there was no specific agreement to surrender the copyhold to Oxwith; but the report in Bacon is very full and circumstantial.

If a man agrees to purchase under limitations in a deed, which makes it necessary upon that transaction for him to look into that deed, and that deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it affecting his purchase (*d*).

So if an estate be subject to incumbrances, and be given by the owner in consideration of another estate given to him, the latter estate is subject in equity to the incumbrances charged at law on the former, and a purchaser, with notice of the transaction, is liable to the incumbrances although he had not notice of them. This was decided by Lord Redesdale, who considered it sufficient that the purchaser, by notice of the deeds, had notice of the equity, although he had not notice of the particular incumbrance. This he said was an equity of which every purchaser under a settlement must have notice; for it is a clear rule, that a man cannot claim under a deed, and avoid the deed; he must submit to the whole; and he has notice of every thing of which the vendor had notice, so far as concerns that deed (*e*). This, it may be observed, was an opinion not intended to decide the case, although it was acquiesced in. It carries the rule much farther, it is apprehended, than is warranted by either principle or authority.

But where a husband has not performed a marriage agreement on his part, he is not entitled to claim the benefit of it (*f*), and a purchaser from him of the considera-

time of the purchase was delivered to the purchaser himself, yet the Court would not affect the purchaser with the presumptive notice, but dismissed the bill.

(*d*) Hamilton *v.* Royse, 2 Scho. & Lef. 326, *per* Lord Redesdale.

(*e*) Hamilton *v.* Royse, 2 Scho. & Lef. 315.

(*f*) Mitford *v.* Mitford, 9 Ves.

tion for the settlement by the wife, with notice of the deed, will be bound by the same equity as the husband was (*g*).

But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of the fraud (*h*). Nor will circumstances amounting to a *mere suspicion* of fraud be deemed notice thereof to a purchaser. This question constantly arises in practice, on sales by tenant for life, and a child to whom he has appointed the estate under an exclusive power of appointment amongst his children. If there was any underhand agreement between the father and son, the power would be deemed fraudulently executed, and the other children might be relieved against it. The difficulty on the part of a purchaser is to ascertain what circumstances, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty by deciding, that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money (*i*).

Although a term assigned generally in trust to attend the inheritance is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser of any incumbrances; for it is notice of nothing but that

jun. 87. See Bascoi *v.* Serra, 14 Ves. jun. 313.

(*g*) Harvey *v.* Ashley, 2 Scho. & Lef. 328, cited.

(*h*) Kenny *v.* Browne, 3 Ridge. P. C. 512. See 17 Ves. jun. 293.

(*i*) M'Queen *v.* Farquhar, 11 Ves. jun. 467; *vide supra*, vol. 1. p. 353.

there is an inheritance to be protected, and that the term is attendant. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee.

But if in an assignment it be declared that the term is assigned to attend the inheritance, *as limited or settled by such a deed*, or to protect *the uses of such a settlement*, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril (*k*).

It has been said that the court-rolls are the title-deeds of copyholds, and a purchaser is affected with notice of the court-rolls as far back as a search is necessary for the security of the title (*l*). But this does not accord with the general rule as to judgments, registered deeds, and the like, and would lead to great inconvenience in practice. It frequently happens that purchasers of property of small value accept the title of a great family under the last settlement, and it would be impossible to hold that they were bound by notice of the contents of the early deeds if not referred to by the settlement. A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court-rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents.

9. The better opinion seems to be, that being a witness to the execution of a deed will not of itself be notice; for a witness, in practice, is not privy to the contents of the deed (*m*).

(*k*) Willoughby *v.* Willoughby, 1 T. Rep. 763; 1 Col. Jurid. 337.

(*l*) Pearce *v.* Newlyn, 3 Madd. 186.

(*m*) Mocatta *v.* Murgatroyd, 1 P. Wms. 393; Editor's and Cox's notes, *ibid.*; Welford *v.* Beezley, 1 Ves. 6; Beckett *v.* Cordley, 1 Bro. C. C. 357. See 1 Ves. jun. 55; and see Harding *v.* Crethorn, 1

This question has hitherto only occurred between a first mortgagee, who witnessed a second mortgage, and the second mortgagee; but it might arise between a purchaser who had, previously to his purchase, attested the execution of a deed relating to the estate, and the person in whose favour the deed was executed.

Lastly, it remains to consider, whether a purchaser is bound to take notice of the mere construction of words which are uncertain in themselves, and often depend on the locality of them for the interpretation which they may receive.

This question arises where a settlement is made in pursuance of articles; but the estate is, contrary to the intention of the parties, limited so as to enable the parent to dispose of it. It is clear that the Court will rectify the settlement according to the intention, in favour of the issue, as between themselves, or as between themselves and persons claiming under the parent without consideration; but this has never yet been done against a purchaser (*n*).

In Senhouse *v.* Earle (*o*), Lord Hardwicke drew a distinction between ancient articles of this sort and modern ones, and expressed his opinion, that in the case of ancient articles the purchaser should not be disturbed, because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in case of notice of modern articles, he thought the Court ought to carry them into execution against a purchaser. But in a later case (*p*), Lord Northington seemed rather of opinion that no relief should be granted against a pur-

Esp. Ca. 56; Holmes *v.* Custance, 12 Ves. jun. 279; Biddulph *v.* St. John, 2 Scho. & Lef. 521; Reed *v.* Williams, 5 Taunt. 257; 6 Dow, 224.

(*n*) Warrick *v.* Warrick, 3 Atk. 291.

(*o*) Ambl. 285.

(*p*) Cordwell *v.* Mackrill, Ambl. 515; and see Hardy *v.* Reeves, 4 Ves. jun. 466; 5 Ves. jun. 426; Parker *v.* Brooke, 9 Ves. jun. 583; and Matthews *v.* Jones, 2 Anstr. 596.

chaser; but this case is not satisfactory, as the language attributed to the Chancellor, on the principal question in that case, is by no means consistent with the prior cases on the subject.

Under these circumstances, a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity(*q*); and, certainly, a court of equity would not enforce a purchaser to take such a title, although no relief might be granted to his prejudice if he actually had purchased.

III. Having endeavoured to show what will be deemed notice, either actual or constructive, we are now to inquire what will be sufficient proof of such notice.

It seems that the counsel, attorney or agent of the purchaser, cannot be admitted to prove notice.

In Maddox *v.* Maddox (*r*), the reading of the deposition of the agent of the purchaser, who swore, in proof of notice, that the deeds were laid before counsel, who made objections about the plaintiff's title, was objected to; but Lord Hardwicke said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness, yet if he consents, the Court will not refuse the reading his deposition. This objection, he added, had often been made; and though some particular Judges had doubted, it was then always over-ruled. And, on investigation, it will, I believe, be found that Lord Hardwicke invariably adhered to this opinion. But it was settled before Lord Hardwicke's time(*s*), and has been the observed rule of the Courts

(*q*) See Fearne's Posth. 315.

(*r*) 1 Ves. 62; and see Bishop of Winchester *v.* Fournier, 2 Ves. 445.

(*s*) Lord Say and Seal's case, 10 Mod. 41. See Lee *v.* Markham, Toth. 110; and Anon. Skin. 404.

ever since(*t*), that counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose, *and this is the privilege of the client*, not of the counsel or attorney (I); for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him.

But a communication by mistake to a person not actually an attorney, although considered so by the person making it, is not protected(*u*); and an attorney may give evidence of the time of executing a deed, for a thing of such a nature cannot be called the secret of his client, it is a thing he may come to the knowledge of without his client's acquainting him, and is of that nature that an attorney concerned, or any body else, may inform the Court of(*v*).

So, if an attorney put his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property, has a right to call upon the attorney, as being the attesting witness(*x*); nor does this privilege extend to communica-

(*t*) Lindsay *v.* Talbot, Bull. N. P. 284; Wilson *v.* Rastall, 4 Term Rep. 753; and see 2 Esp. N. P. 716; Wright *v.* Mayer, 6 Ves. jun. 280; Sloman *v.* Herne, 2 Esp. Ca. 695; Robson *v.* Kemp, 5 Esp. Ca. 52; Brand *v.* Ackerman, *ib.* 119; Rex *v.* Withers, 2 Camp. 578; Parkhurst *v.* Lowten, 2 Swanst. 194.

(*u*) Fountain *v.* Young, 6 Esp. Ca. 113.

(*v*) Lord Say and Seal's case, 10 Mod. 41.

(*x*) Robson *v.* Kemp, 5 Esp. Ca. 52; Doe *v.* Andrews, Cowp. 845.

(I) This was insisted upon in the reasons in Radcliffe *v.* Fursman, in the year 1730. See printed cases, *Dom. Proc.*

tions from collateral quarters, although made to him in consequence of his character of attorney; the privilege is restricted to communications, whether oral or written, from the client to his attorney (*y*), but it is not necessary that a cause should have commenced (*z*).

If notice be only proved by one witness, a positive and express denial by the answer will prevent the Court from decreeing against the answer (*a*): for in equity the general rule is, that if the answer contains a positive denial of the case stated in the bill, and it is contradicted by one witness only, there cannot be a decree against the defendant, unless the circumstances so preponderate, that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness than to the answer of the defendant; laying aside all recollection that the oath of one of the parties is that of an interested person (*b*).

But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to himself, whereas in other respects it will equally affect him, there are several cases where the Court, on one undoubted witness, would decree against the answer; for instance, a person denying only personal notice is a negative pregnant, that still there may be notice to his agent, which is a fact equally material (*c*).

And where the answer is not *ad idem*, the charge being positive, and the answer only to belief, which is not suffi-

(*y*) Spenceley *v.* Schulenburgh, 7 East, 357.

(*z*) Clark *v.* Clark, 2 Mood. & Malk. 3.

(*a*) Alam *v.* Jourdon, 1 Vern. 161; 3 Cha. Ca. 123; Kingdome *v.* Boakes, Prec. Cha. 19; Mortimer *v.* Orchard, 2 Ves. jun. 243; and see Evans *v.* Bicknell, 6 Ves. jun. 174; 3 Cha. Ca. 123; Dawson *v.* Massey, 1 Ball & Beatty, 234; Cooke *v.* Clayworth, 18 Ves. 12.

(*b*) *Per* Lord Eldon, East India Company *v.* Donald, 9 Ves. jun. 275; 1 Smith, 213.

(*c*) See 1 Ves. 66; 3 Atk. 650.

cient to contradict what is positively sworn, a single witness will be sufficient (*d*).

So where there are a great many concurring circumstances, that strengthen and support the depositions of a single witness, his evidence alone will enable the Court to decree against the answer (*e*).

If the evidence is not clear enough to enable the Court to make a satisfactory decree, it will be sent to law to be tried (*f*), unless the value of the property will not admit of it (*g*).

But the same rule that would absolutely prevent a decree from being made will restrain the Court from directing an issue (*h*); for the matter is only referred to law, to know what a court of equity ought to do (*i*); and sending it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict, is the same thing as decreeing on one witness, without trying it at all (*k*).

Formerly, an issue used to be directed, although upon the evidence a decree could not be made (*l*), and in such cases the defendant's answer was to be read at the trial, not as evidence, for that could not be, nor was it to be admitted to be true, but to be sworn, so that the defendant might have the benefit of his oath at law as well as

(*d*) See 1 Ves. 97; and see Pilling *v.* Armitage, 12 Ves. jun. 78.

(*e*) Walton *v.* Hobbs, 2 Atk. 19; Anon. 3 Atk. 270; Only *v.* Walker, 3 Atk. 407; Pember *v.* Mathers, 1 Bro. C. C. 52; East I. C. *v.* Donald, 9 Ves. jun. 275; 1 Smith, 213; and see 6 Ves. jun. 40; Biddulph *v.* St. John, 2 Scho. & Lef. 521.

(*f*) Arnot *v.* Biscoe, 1 Ves. 95.

(*g*) Jolland *v.* Stainbridge, 3 Ves. jun. 478.

(*h*) Pember *v.* Mathers, 1 Bro. C. C. 52.

(*i*) See 1 Bro. C. C. 53, 54; 9 Ves. jun. 284; 1 Smith's Rep. 219.

(*k*) See 1 Eq. Ca. Abr. 229, pl. 13.

(*l*) Stadd *v.* Cason, Toth. 230; Ibbotson *v.* Rhodes, 2 Vern. 554; 1 Eq. Ca. Abr. 229, pl. 13, S. C.; Cant *v.* Lord Beauclerk, 3 Atk. 408, cited; *sed vide* Christ College *v.* Widdington, 2 Vern. 283.

in equity, if it would have any weight with the jury. But this could only be done where it was merely oath against oath (*m*); and as an issue would not now be directed in such a case, the answer of the defendant cannot, it should seem, at the present day, be directed to be read at a trial at law. But if a bill is filed for a discovery only, the answer of the defendant may of course be read on the trial (*n*).

It must be remarked, that if the notice arise by construction of equity on a deed which is in the possession of the purchaser (*o*), and he contend that it did not come into his custody till after the completion of his purchase, the proof thereof will lie on him (*p*).

In one case (*q*), however, although the only evidence of the deed being in the possession of the defendant was the discovery in his answer, and on the deed being produced the counsel offered to read the answer, to show that it had not been delivered to him till lately, and long after he had purchased the estate, Lord Hardwicke refused it, although it was argued to be very hard; because the only account of the delivery of the deed was in the answer; and by its not being permitted to be read the deed must be taken to be in his custody at the time of the purchase, ten years before it actually was.

But it seems, that the defendant had sufficient notice, besides the mere custody of the deed. His conveyance recited all the former deeds; and therefore reading the answer, to prove when the deed in question came into his custody, was perfectly unnecessary. This case, therefore, cannot be deemed subversive of the general rule.

(*m*) Only *v.* Walker, 3 Atk. 407.
(*n*) See 9 Ves. jun. 282; 1 Smith, 218.
(*o*) See 1 Ves. 392.
(*p*) See 2 Ves. 486.
(*q*) Mertins *v.* Joliffe, Ambl. 311.

CHAPTER XVIII.

OF PLEADING A PURCHASE.

"SUPPOSING a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit (*a*)."

The principle of this plea, Lord Eldon observes, is this: "I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide* (*b*)."

This plea is a peremptory plea, and must be sworn by the pleader (*c*). It must be put in *ante litem contestatam*, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to any thing to which he may plead, he over-rules his plea (*d*), but he

(*a*) Mitford on Pleading, 2d edit. p. 215; Gough *v.* Stedman, Finch, 208.

(*b*) See Wallwyn *v.* Lee, 9 Ves. jun. 24.

(*c*) Marshall *v.* Frank, Prec. Cha. 480.

(*d*) Richardson *v.* Mitchell, Sel. Cha. Ca. 51; Blacket *v.* Langlands, 1 Anstr. 14.

may answer any thing *in subsidium* of his plea, as he may deny notice in his answer, which he may deny also in his plea; because that is not putting any thing to issue which he should cover by his plea from being put in issue, but it is adding, by way of answer, that which will support his plea, and not an answer to a charge in the bill, which by the plea he would decline (*e*).

But the purchaser must protect himself by plea, for if he answer, he is bound to answer fully.

The plea must state the deeds of purchase, setting forth the dates, parties and contents briefly, *and the time of their execution* (I), for that is the peremptory matter in bar (*f*) (II).

It must aver that the vendor was seised, or pretended to be seised at the time he executed the conveyance (*g*). In Carter *v.* Pritchard (*h*) it was held, that the plea of a purchase without notice must aver the defendant's *belief* that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the

(*e*) Gilb. For. Rom. 58. See Hoare *v.* Parker, 1 Bro. C. C. 573.

(*f*) See Gilb. For. Rom. 58; Aston *v.* Aston, 3 Atk. 302; and 2 Ves. 107. 396; and see Wallwyn *v.* Lee, 9 Ves. jun. 24.

(*g*) Story *v.* Lord Windsor, 2 Atk. 630; Head *v.* Egerton, 3 P. Wms. 279; and see 17 Ves. jun. 290; Jackson *v.* Rowe, 4 Russ. 514.

(*h*) Michael. Term, 12 Geo. 2, 1739; 2 Vivian's MS. Rep. 90, in Lincoln's Inn Library; see Jackson *v.* Rowe, 4 Russ. 514.

(I) *Qu.* this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See Anon. 2 Cha. Ca. 161. In Day *v.* Arundel, Hard. 510, it was expressly held that the time of the purchase need not be stated in the plea.

(II) It seems, that the practice formerly was, to extend the plea to the discovery even of the purchase-deeds; and in Watkins *v.* Hatchet, 1 Eq. Ca. Abr. 33, pl. 3, although the purchaser improvidently offered to produce his purchase-deeds, yet the Court would not bind him to do so.

title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for if a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail (I), then there is no bar against the issue (*i*). Where, however, a fine is pleaded, the plea must aver an *actual* seisin of a freehold in the vendor, and not that he was seised, or pretended to be seised (*k*).

If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance (*l*). And if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion (*m*). But although a bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the plaintiff's ancestor (*n*).

The plea must also distinctly aver that the consideration-money mentioned in the deed was *bonâ fide* and truly paid (*o*), independently of the recital of the purchase-deed (*p*); for if the money be not paid, the plea will be

(*i*) Gilb. For. Rom. 57.

(*k*) Story *v.* Lord Windsor, 2 Atk. 630; and see Page *v.* Lever, 2 Ves. jun. 450; Dobson *v.* Leadbeater, 13 Ves. jun. 230.

(*l*) Trevanian *v.* Mosse, 1 Vern. 246; and see 3 Ves. jun. 226; and 3 Ves. jun. 32.

(*m*) Hughes *v.* Garth, Ambl. 421.

(*n*) Seymour *v.* Nosworth, 2 Freem. 128; 5 Ch. Rep. 23; Nels. Cha. Rep. 135.

(*o*) Moor *v.* Mayhow, 1 Cha. Ca. 34. See 2 Atk. 241.

(*p*) Maitland *v.* Wilson, 3 Atk. 814.

(I) This is the doctrine of Littleton, with which, it seems, Gilbert agrees; but since Littleton's time it has been held that the releasee has a base fee determinable by the entry or action of the issue. See Butler's n. (1) to Co. Litt. 331, a. and the authorities there referred to But now estates tail may be barred by deed, 3 & 4 Will. 4, c. 74.

overruled (*q*), as the purchaser is entitled to relief against payment of it (*r*). The particular consideration must, it should seem, be stated (*s*), although this point has been decided otherwise (*t*). There can, however, be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy (*u*). The question is not whether the consideration is adequate, but whether it is valuable. For if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal (*x*), or the purchase is such a one as would hinder a *puisne* purchase from overturning it, it ought not to be impeached in equity.

The plea must also deny notice of the plaintiff's title or claim (*y*) previously to the execution of the deeds and payment of the purchase-money (*z*); for till then the transaction is not complete; and, therefore, if the purchaser have notice previously to that time he will be bound by it (*a*). And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*b*). But a denial of notice at the time of making the purchase, and paying the purchase-

(*q*) Hardingham *v.* Nicholls, 3 Atk. 304.

(*r*) See *supra*, vol. i. p. 554.

(*s*) Millard's case, 2 Freem. 43; and Snag's case, cited *ibid.*; and see Wagstaff *v.* Read, 2 Cha. Ca. 156.

(*t*) Moor *v.* Mayhow, 1 Cha. Ca. 34; Day *v.* Arundell, Hard. 510.

(*u*) Basset *v.* Nosworthy, Finch, 102; Ambl. 767; Mildmay *v.* Mildmay, Ambl. 767, cited; Bullock *v.* Sadlier, Ambl. 764.

(*x*) See Moor *v.* Mayhow, 1 Cha. Ca. 34; Wagstaff *v.* Read, 2 Cha. Ca. 156.

(*y*) Lady Bodmin *v.* Vendebendy, 1 Vern. 179; Anon. 2 Ventr. 361, No. 2.

(*z*) Moor *v.* Mayhow, 1 Cha. Ca. 34; Story *v.* Lord Windsor, 2 Atk. 630; Attorney-General *v.* Gower, 2 Eq. Ca. Abr. 685, pl. 11.

(*a*) *Vide supra*, vol. ii p. 274.

(*b*) Kelsall *v.* Bennett, 1 Atk. 522; which has overruled Bramton *v.* Barker, 2 Vern. 159, cited.

money, is good; and notice *before* the purchase need not be denied, because notice before is notice at the time of the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury (*c*).

The notice must be positively and not evasively denied (*d*), and must be denied, whether it be or be not charged by the bill (*e*). If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied as specially and particularly as charged (*f*).

But he need only by this plea deny notice generally (*g*), unless where facts are specially charged in the bill as evidence of notice (*h*).

Notice must also be denied by answer, for that is matter of fraud, and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency if he think fit (*i*); but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue (*k*).

Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer (*l*), and the omission will not invalidate his

(*c*) Jones *v.* Thomas, 3 P. Wms. 243.

(*d*) Cason *v.* Round, Prec. Cha. 226; and see 2 Eq. Ca. Abr. 682, (D.) n. (b).

(*e*) Aston *v.* Curzon, and Weston *v.* Berkely, 3 P. Wms. 244, n. (*f*); and see the 6th resol. in Brace *v.* Duke of Marlborough, 2 P. Wms. 491.

(*f*) Meder *v.* Birt, Gilb. Eq. Rep. 185; Radford *v.* Wilson, 3 Atk. 815; and see Jerrard *v.* Saunders, 2 Ves. jun. 187; 4 Bro. C. C. 322; 6 Dow. 230.

(*g*) Ovey *v.* Leighton, 2 Sim. & Stu. 234.

(*h*) Pennington *v.* Beechey, 2 Sim. & Stu. 282; Thring *v.* Edgar, 2 Sim. & Stu. 274.

(*i*) Anon. 2 Cha. Ca. 161; Price *v.* Price, 1 Vern. 185.

(*k*) Harris *v.* Ingledew, 3 P. Wms. 91; Meadows *v.* Duchess of Kingston, Mitf. on Plead. 2d edit. 216, n.

(*l*) Anon. 2 Cha. Ca. 161.

plea, if it is denied by that (*m*). If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase, and it is not material if the plaintiff do prove notice, as he has waved setting down the plea for argument, in which case it would have been overruled (*n*). If, however, a bill is exhibited against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to; and the former proceedings cannot be pleaded in bar (*o*). But if notice is neither alleged by the bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (*p*).

A plea of a purchase for valuable consideration without notice, will not be allowed where the purchaser might by due diligence have ascertained the real state of the title (*q*).

If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed, and the decree affirmed without further inquiry (*r*).

The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the

(*m*) Coke *v.* Wilcocks, Mose. 73.

(*n*) Harris *v.* Ingledew, 3 P. Wms. 91; Eyre *v.* Dolphin, 2 Ball & Beat. 02.

(*o*) Williams *v.* Williams, 1 Cha. Ca. 2.

(*p*) Hardy *v.* Reeves, 5 Ves. jun. 426.

(*q*) Jackson *v.* Rowe, 2 Sim. & Stu. 472. See and consider the case. It has been heard upon appeal before the Lord Chancellor.

(*r*) Lewes *v.* Fielding, Colles's P. C. 361.

purchaser (*s*), not a sword to attack the possession of others (*t*). It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned (*u*); whether it will avail against a legal title is perhaps doubtful.

In Burlase *v.* Cooke (*x*), Lord Nottingham held the plea to be good against a legal estate; but in the subsequent case of Rogers *v.* Seale (*y*), he is reported to have been of a different opinion, and to have decreed accordingly. But unfortunately both these cases appear to be very ill reported.

In Parker *v.* Blythmore (*z*), the Master of the Rolls thought the plea good against a legal estate.

But in Williams *v.* Lambe (*a*), upon a bill filed by a dowress against a *bonâ fide* purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a *legal title*, as dower is, the plea did not apply, it being only a bar to an *equitable*, not to a *legal* claim.

In a later case (*b*), Lord Rosslyn considered it impossible that Rogers *v.* Seale could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title.

Lord Rosslyn did not, however, mention the case of Williams *v.* Lambe, which is against the doctrine he laid down; nor, indeed, did he notice the case of Parker *v.* Blythmore, which is in favour of it. It is much to be lamented that all the authorities were not considered.

(*s*) Patterson *v.* Slaughter, Ambl. 292.

(*t*) See 3 Ves. jun. 225.

(*u*) See 1 Ball & Beatty, 171.

(*x*) 2 Freem. 24.

(*y*) 2 Freem. 84.

(*z*) 2 Eq. Ca. Abr. 79, pl. 1.

(*a*) 3 Bro. C. C. 264.

(*b*) Jerrard *v.* Saunders, 2 Ves. jun. 454.

To argue from principle, it seems clear that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favour of that doctrine certainly preponderate, we may, perhaps, venture to assert that it will protect against both. But in a very late case, the Master of the Rolls followed the case of Williams *v.* Lambe, and was of opinion that the defence was of no avail against a legal title (*c*).

(*c*) Collins *v.* Archer, 1 Russ. & Myl. 284.

APPENDIX.

No. I.

Notice by the Owner and his Agent, of the Agent's intention to bid (*a*).

SIR,

I, THE undersigned *A*, of owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I have appointed the undersigned *B*, of, &c. to bid on my behalf, or for my use, at the same sale. And I, the above-named *B*, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said *A*.

To Mr. Auctioneer.

No. II.

Notice by the Agent of his intention to bid (*b*).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I intend to bid at the same sale, on the behalf, or for the use of the above-named *B*.

To Mr. Auctioneer.

No. III.

Notice by the Agent, and the Person appointed by him, of such Person's intention to bid (*c*).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at by public auction,

(*a*) *Vide supra*, vol. i. p. 18. (*b*) *Vide supra*, vol. i. p. 19.
(*c*) *Vide supra*, vol. i. p. 19.

on the day of next, do hereby give you notice, that I have appointed the undersigned *C*, of, &c. to bid at the same sale, on the behalf, or for the use of the above-named *B*. And I, the said *C*, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said *B*.

To Mr. Auctioneer.

No. IV.

Conditions of Sale (*d*).

I. That the highest bidder shall be the buyer: and if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding.

II. That no person shall advance less at any bidding than . . . *l.* (I); or retract his or her bidding (*e*).

III. That every purchaser shall immediately pay down a deposit, in the proportion of . . . . *l.* for every 100 *l.* of his or her purchase-money, into the hands of the *auctioneer* (II); and sign an agreement for payment of the remainder to the proprietor, on the day of next, at at which time and place the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots; all outgoings to that time being cleared by the vendor.

IV. That within from the day of the sale, the vendor shall, at his own expense, prepare and deliver an abstract of his title to each purchaser, or his or her solicitor; and shall deduce a good title (III) to the lots sold.

V. That upon payment of the remainder of the purchase-money at the time above mentioned, the vendor shall convey the lots to the respective purchasers: each purchaser, at his or her own expense, to prepare the conveyance to him or her; and to

(*d*) *Vide supra*, vol. i. p. 30.
(*e*) Payne *v.* Cave, 6 Term Rep. 148. *Vide supra*, vol. i. p. 43. This has now become an usual condition.

(I) Or thus, "than such sum shall be named by the auctioneer at the time."

(II) This is scarcely ever done in the country; but the deposits are paid to the agent of the vendor.

(III) Where the estate is leasehold, and the vendor cannot produce the lessor's title, this condition should go on thus: "to the lease granted of the premises; but the purchaser shall not be entitled to require, or call for the title of the lessor." *Vide supra*, vol. i. p. 38.

tender or leave the same at for execution by the vendor (*f*).

VI. That the auction-duty of 7*d.* in the pound shall, immediately after the sale, be paid to the auctioneer by the vendor and purchaser, in equal moieties (*g*) (I).

VII. That if any of the purchasers shall neglect or fail to comply with the above conditions, his or her deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot or lots bought by him or her, either by public auction or private contract; and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall immediately after the same sale, be made good to the vendor by the defaulter at this present sale: and in case of the nonpayment of the same, the whole thereof shall be recoverable by the vendor, as and for liquidated damages (*h*), and it shall not be necessary to previously tender a conveyance to the purchaser.

Lastly, That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require (*i*). Such compensation or equivalent to be settled by two referees, or their umpire; each party within ten days after the discovery of the error, and notice thereof given to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire (as the case may be) shall be final.

Condition to be inserted where the Title-deeds cannot be delivered up (*k*).

That as the title-deeds which concern this estate relate to other estates of greater value, the vendor shall retain the same in his custody, and enter into the usual covenants (to be pre-

(*f*) *Vide supra*, vol. i. p. 39.
(*g*) *Vide supra*, vol. i. p. 44.
(*h*) *Vide supra*, vol. i. p. 40.
(*i*) *Vide supra*, vol. i. p. 41.
(*k*) *Vide supra*, vol. i. p. 38.

(I) This condition should be omitted where the estate is sold by assignees of a bankrupt. *Vide supra*, vol. i. p. 13, 14.

pared by his solicitor, and at his expense) for the production of them to the respective purchasers: but all attested copies which may be required of such deeds shall be had and made at the expense of the person requiring the same.

Where an Estate is intended to be sold in Lots, and the Title-deeds are to be delivered up, the following Condition may be inserted:

That as the aforesaid lots are holden under the same title, the purchaser of the greater part in value of the said estate shall have the custody of the title-deeds, upon his entering into the usual covenants for the production thereof to the purchaser or purchasers of the remaining or other lots: If the largest portion in value of the estate shall remain unsold, the seller shall be entitled to retain the deeds upon entering into such covenants as aforesaid; all such covenants to be prepared by and at the expense of the person or persons requiring the same; who may have attested copies of such deeds at his, her or their own expense.

Or this:

That the title-deeds shall be retained by the vendor, until all the estates now offered for sale shall be sold, when they shall be delivered over to the largest purchaser, upon his entering into the usual covenants for the production thereof to the other purchasers; such covenants to be prepared by and at the expense of the person or persons requiring the same. Whilst the deeds remain in the seller's hands, he shall produce them to the several purchasers when required, and every purchaser may at any time have attested copies of the deeds at his own expense.

Where the Property is considerable, it may be advisable to make a stipulation as to the expense of the attested copies, according to the value of the lots. As, for instance:

That all attested copies of the title-deeds shall be made and delivered at the expense of the person requiring the same, unless his or her purchase-money exceeds . . . *l.* but does not amount to . . . *l.*; in which case the vendor shall furnish the attested copies of all such deeds and writings as shall be deemed necessary, according to Professional usage, at the joint expense of him and the purchaser; and if the purchase-money exceeds . . . . *l.* the vendor shall furnish the same at his own expense.

No. V.

Agreements to be signed by the Vendor and Purchaser after Sales by Auction (*l*).

It seems advisable to have two sets of Conditions, at the end of one of which may be printed an Agreement for the Auctioneer, or Agent of the Vendor, to sign; and at the end of the other may be printed an Agreement for the Purchaser to sign.

The Agreement to be signed by the Auctioneer, or Agent of the Vendor, may be thus:

I do hereby acknowledge, that has been this day declared the purchaser of lot of the estates mentioned in the above-written particulars, at the sum of . . . *l.*; and that he has paid into my hands . . . *l.* as a deposit, and in part payment of the said purchase-money; and I do hereby agree, that the vendor shall, in all respects, fulfil on his part the above-written conditions of sale. As witness my hand, this day of

Purchase-money - - - - £.
Deposit-money - - - -

Remainder unpaid - - £.

Witness,

The Purchaser may sign the following Agreement:

I do hereby acknowledge, that I have this day purchased by public auction, lot of the estates mentioned in the above-written particulars, for the sum of . . . . *l.*; and have paid into the hands of the sum of . . . . *l.* as a deposit and in part payment of the said purchase-money; and I do hereby agree to pay the remaining sum of . . . . *l.* unto at on or before the day of and in all other respects, on my part, to fulfil the above-written conditions of sale. As witness my hand, this day of

Purchase-money - - - - £.
Deposit-money - - - -

Remainder unpaid - - £.

Witness,

(*l*) *Vide supra*, vol. i. p. 52.

No. VI.

Agreement for Sale of an Estate by Private Contract (*m*).

Articles of agreement made and entered into this day of between *A*, of, &c. for himself, his heirs, executors and administrators, of the one part, and *B*, of, &c. for himself, his heirs, executors and administrators, of the other part, as follow: viz.

The said *A* doth hereby agree with the said *B* to sell to him the messuages, &c. (*parcels*) with their appurtenances, at or for the price or sum of . . . . *l.*; and that he the said *A* will within one month from the date hereof, at his own expense, make and deliver unto the said *B*, or his solicitor, an abstract of the title of him the said *A* to the said messuages and premises; and will also, at his own expense, deduce a clear title thereto. And also that the said *A*, or his heirs, and all other necessary parties, shall and will, on or before the day of next, on receiving of and from the said *B*, his executors or administrators, the said sum of . . . . *l.* at the costs and charges of him the said *B*, his heirs, executors, administrators or assigns, execute a proper conveyance, for conveying and assuring the fee-simple and inheritance of and in all the said messuages and premises, with their appurtenances, unto the said *B*, his heirs or assigns, free from all incumbrances.

And the said *B* hereby agrees with the said *A*, that he the said *B*, his heirs, executors, administrators or assigns, shall and will, on the execution of such conveyance as aforesaid, pay the sum of . . . *l.* unto the said *A*, his executors or administrators.

And it is hereby further agreed by and between the said *A* and *B* as follows: viz.

That the conveyance shall be prepared by and at the expense of the said *B*, and that the same shall be settled and approved of on the parts of the said *A* and *B* by their respective counsel; and that each of them, the said *A* and *B*, shall pay the fees of his own counsel.

And that all rates, taxes and outgoings, payable for or in respect of the premises to the day of shall be paid and discharged by the said *A*, his executors or administrators.

And lastly, that if the said *A* shall not deliver an abstract of his title to the said *B*, or his solicitor, before the expiration of

(*m*) *Vide supra*, vol. i. p. 53.

one calendar month from the date hereof, or shall not deduce a good and marketable title to the said messuages and premises, before the said day of then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said day of (as the case may be), this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid execution of this agreement shall not be enforced by any court of equity, notwithstanding any rule (if such there be) that time cannot be made the essence of a contract, or any other rule or maxim whatsoever (*n*). In witness, &c.

A provision may also be inserted in agreements, making time the essence of the contract, in case the purchase-money is not paid at the day appointed; but clauses making agreements void if a title is not made, or the purchase-money paid by a stated time, should never be inserted unless it be the express intention of the parties. Where time is not deemed material, clauses to the following effect should be inserted:

That the said *B* and his heirs shall have, receive and take the rents and profits of the said messuages and premises, from the day of next, for his and their proper use.

And that if the said conveyance shall not be executed by the necessary parties, and the said purchase-money paid on or before the said day of then and in such case the said *B*, his heirs, executors or administrators, shall from the same day of pay interest for the said purchase-money unto the said *A*, his executors or administrators, after the rate of *per cent. per ann.*

No. VII.

Bratt v. *Ellis* (*o*), *C. B. Mich. and Hil. Terms, 45 Geo. III.*

John Goodwin being indebted to Ellis, the defendant, an auctioneer, deposited the title-deeds of some houses with him, as a security; and gave him a written authority to sell them by auction, at any time before Midsummer 1803. They were

(*n*) *Vide supra*, ch. 8, sect. 2, vol. i. p. 444. (*o*) *Vide supra*. vol. i. p. 45.

accordingly put up at Garraway's; and not fetching the sum expected, they were bought in by Goodwin. Ellis not being paid, put up the houses again in September 1804, under the usual conditions. The plaintiff was declared the highest bidder at 315*l.*; paid a deposit of 75*l.* and signed an agreement to complete the contract. The defendant delivered possession to the plaintiff, who expended about 10*l.* in repairs; and the defendant sent the deeds to the plaintiff's attorney, who approved of the title, and prepared a conveyance; and the defendant undertook to procure Goodwin to attend and execute the deed. Goodwin, however, upon being applied to, refused to complete the contract, which was made without his authority. The plaintiff brought the present action to recover the deposit-money and interest, and the expense of perusing the abstract, preparing the conveyance, &c.; and the damages the plaintiff had sustained by losing such a good bargain. The plaintiff gave 315*l.* for the houses, and a surveyor, examined on his behalf, proved that they were worth 751*l.* The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry of damages, the defendant's counsel admitted, that he was liable to repay the deposit, with interest, and fair expenses incurred in investigating the title, &c. But as it appeared by the declaration that the defendant was only an auctioneer, and Goodwin was the owner, he insisted that the defendant was not answerable for the difference of value. The sheriff, in his charge to the jury (which was specially summoned), said, it was admitted on all hands, that the deposit and interest, and expenses, must be paid to the plaintiff. With respect to the demand for the loss of the bargain, he thought that the demand was recoverable; for the defendant had admitted that he had sold the property without authority; but the amount of the damages was in their discretion. They would consider whether it would have sold for 751*l.* If they believe the surveyor, it would be quite competent to give the whole, or what they pleased. The jury returned a verdict for 350*l.* being upwards of 250*l.* as damages for loss of the bargain. The Court of Common Pleas, however, granted a rule to show cause why the writ of inquiry should not be set aside, and the defendant let in to plead in the action, upon paying into Court the deposit-money, and interest, and on payment by the defendant to the plaintiff of his costs occasioned thereby, together with his costs of the present application. Upon showing cause, the Court made the rule absolute; on

payment to the plaintiff of the deposit, with interest, the costs of investigating the title, and the costs of the action, *as between attorney and client.*

No. VIII.

Jones v. *Dyke and others* (*p*). *Hereford Summer Assizes, cor. Macdonald, C. B.*

The circumstances of the case were shortly these. Some estates in Wales having been advertised for sale, the plaintiff came to town, and after some treaty with the defendants, who were the auctioneers employed, he agreed to purchase the estate in question, at 975 *l.*; and it was agreed that he was to pay the deposit in nine days, and to give his note for it at that date, which he accordingly did. Tuchin, one of the defendants, by the desire of his partner Dyke, gave the plaintiff a receipt for the deposit, and signed a printed particular, which together amounted to an agreement in writing.

In a few hours after this transaction, Dyke and Tuchin called on a friend of the plaintiff's to acquaint him that they had just received a letter from Wales, stating that the estates were sold for more money, and requesting the particular and receipt to be returned; and the plaintiff refusing to relinquish the agreement, and having immediately returned to Wales, they by the next post sent to him his note of hand, and a particular signed by him, both of which he instantly returned.

The 100 *l.* was tendered in payment of the note, and refused: the residue of the purchase-money was prepared in time, and deposited at a banker's.

The plaintiff filed a bill in equity against the owner of the estate, and his trustees for sale, who denied the authority of the defendants to sell, in consequence of which the plaintiff was advised to dismiss his bill.

The plaintiff then brought an action against the defendants, in which he proved by two witnesses that the estate purchased was worth 2,117 *l.* 10 *s.* so that he lost upwards of 1,140 *l.* by breach of the agreement.

It appearing that the defendants had no authority to sell, the plaintiff had a verdict by consent, for 261 *l.* the Judge thinking

(*p*) *Vide supra*, vol. i. p. 45.

the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain.

The sum of 261 *l.* was thus made up:	£.	*s.*	*d.*
Costs of the plaintiff's solicitor - - - - - - -	47	19	4
Costs of the trustees in equity, about - - - - -	30	–	–
Interest of 975 *l.* from April 1804 to April 1807 -	146	5	–
Journies to London and Llandilo, about 20 days, horse-hire and travelling expenses - - - - -	21	–	–
Journey to London - - - - - - - - - - - -	15	15	–
	£. 260	19	4

No. IX.

Wyatt v. *Allan* (*q*), *Reg. Lib. B.* 1777, *fol.* 576.

The bill was filed by Wyatt, charging that he, as agent for the defendant Allan, purchased an estate by auction, but that the defendant having denied the commission, he himself was forced to complete the purchase. The purchase-money was 435 *l.* The defendant by his answer denied that he employed the plaintiff to purchase the estate.

The Chancellor directed an issue to try the fact, and that if the jury found that an authority was given by Allan, they should indorse on the postea to what amount such authority extended. The jury found that Allan did give an authority to the extent of 400 *l.* Upon the cause coming back on the equity reserved, the defendant was ordered to pay the plaintiff the 400 *l.* and the plaintiff was to assign the estate, and the defendant was to pay the costs both at law and in equity.

No. X.

Sir John Morshead and others v. *Frederick* (*r*) *and others.*
Ch. 20*th February* 1806.

Certain estates of the late Sir John Frederick were devised to trustees upon trust, by mortgage or sale thereof, to raise 34,000 *l.* for the benefit of his two daughters, Lady Morshead and Miss Thistlethwayte. Part of his estate consisted of a house in the

(*q*) *Vide supra*, vol. i. p. 46. (*r*) *Vide supra*, vol. i. p. 72.

occupation of Smith, Payne and Smith, the bankers. In 1751, a ground lease of this house was granted for sixty-one years, at 56 *l.* a year. The representative of the lessee assigned the lease to Smith and Company, subject not only to the original ground rent of 56 *l.* a year, but also to an additional rent of 210 *l.* A bill was filed for carrying the trusts of Sir John Frederick's will into execution. With the approbation of all parties, the house in question was offered for sale, and represented as subject to the ground lease at 56 *l.* a year. Smith and Company employed an auctioneer to enter into a treaty with the plaintiffs' solicitors for the purchase of the house, and he was informed by them that it was subject to the lease at 56 *l.* a year. The auctioneer valued the house as being subject to the lease, and to no other rent, charge, or incumbrance, at 6,150 *l.* and verbally agreed with the plaintiffs' solicitors for the purchase by Smith and Company of the house at that sum: the contract was referred to the Master, who approved of it, and by an order in the cause, Smith and Company were directed to pay the purchase-money into Court, to the credit of the cause, and it was ordered that they should be let into receipt of the rents from the last quarter day. The title was approved of on behalf of the purchasers, and the money was paid into the Bank according to the order. A few months afterwards, and before the conveyance was executed, application was made to Smith and Company for payment of the rent of 210 *l.* to the person entitled to it. Upon this, Smith and Company insisted upon an abatement in the purchase-money, which the plaintiffs would not accede to. A motion was then made to the Court by Smith and Company, that the money paid into the Bank might be repaid to them, and the contract for the purchase of the house rescinded. In support of this motion, the auctioneer swore, that he valued the house as subject to the 56 *l.* a year only, and that he was ignorant of its being subject to any other rent or outgoing. The solicitor for Smith and Company swore, that no notice was taken in the abstract of the lease, by which the 210 *l.* a year was reserved. One of the bankers swore, that when the money was paid into the Bank, and when the valuation was made, he and his partners believed that the auctioneer had been made fully acquainted with all the charges, whether consisting of rents or otherwise, which in anywise affected the house; and that his not being made acquainted with the rent of 210 *l.* was occasioned by some undesigned omission or mistake.

In opposition to these affidavits, the solicitor of the plaintiffs swore, that he had been in receipt of the rent of 56*l.* a year nearly thirty years, which had been paid by Smith and Company since 1797, and that he had never heard that the house was ever granted by any under lease, or was made subject to any other rent than the rent of 56*l.* until long after the sale to the bankers. And that upon inquiry he found, *that the rent of* 210*l. had been paid by the bankers themselves ever since they purchased the lease.*

The motion came on before Lord Eldon, who expressed an opinion in favour of the purchaser's right to rescind the contract, but did not decide the point. It afterwards came before Lord Erskine, who held this to be a proper case for the interference of equity, on the ground of *mistake*, and accordingly granted the motion. The circumstance of both rents being payable by the purchasers, his Lordship thought immaterial, as it appeared that they had not communicated that circumstance to their broker, and the magnitude of their concerns might easily account for the omission. It could not be imagined, that any man would willingly conceal such a fact from a broker employed by him to value any property he wished to purchase; and it was equally absurd to suppose, that if a broker, in valuing any property, was ignorant of the existence of an additional rent of 200*l.* no relief lay against such a mistake in a court of equity.

No. XI.

A Bill for extending the Provisions of the Statute of Frauds(*s*).

Whereas by an act passed in the twenty-ninth year of his Majesty Charles the Second, entitled "An Act for the Prevention of Frauds and Perjuries," it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized: And whereas a similar

(*s*) *Vide supra*, vol. 1, p. 86.

enactment is contained in an act passed in Ireland, in the seventh year of the reign of King William the Third: And whereas it has been held that an agreement signed by one party, or his agent, is binding upon him, and that it is not necessary for a party or his agent to subscribe his name to the agreement for the purpose of authenticating it, where the name is introduced in the agreement itself; and in some cases concluded contracts have been allowed to be collected and made out from receipts for purchase-money, letters, correspondence or proposals, or the like, not assuming the ordinary shape of an agreement or a memorandum, or a note thereof: And whereas courts of equity have, on the ground of part performance, held certain cases of parol agreements not to fall within the mischief of the enactments aforesaid: And whereas it is expedient to alter and amend the law as it is at present administered under the said statutes in the respects aforesaid; Be it therefore enacted, that no action or suit shall be brought or maintained whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the same is brought, or some memorandum or note thereof, shall be in writing, and signed by the parties to be charged therewith, or some other persons by them lawfully authorized at the foot thereof, in the usual manner of subscribing regular agreements.

And be it further enacted, that letters or correspondence passing between the parties or their authorized agents, or an offer in writing by the one party, and acceptance in writing by the other, shall not be deemed in any case to amount to an agreement upon which an action or suit may be brought or maintained under the provisions of the said recited acts or of this act.

And be it further enacted, that neither delivery of possession of the estate which is the subject of the contract, nor payment of the purchase-money or rent agreed to be paid for the estate, or expenditure of money by any of the parties on the estate, or any other act whatsoever, shall be deemed to amount to a part performance of any agreement made upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, so as to enable a court of equity to decree a specific performance of any such agreement, where the same is not signed in the manner required by this act.

Provided always, and be it enacted, that where any agreement shall be *bonâ fide* made upon any contract or sale of lands,

tenements or hereditaments, or any interest in or concerning the same, and the same shall not be signed in the manner by this act required, to enable an action or suit to be brought or maintained thereupon, but where it is upon a sale, the seller, upon the faith and footing of such contract, shall have let the purchaser into possession of the property sold, or the purchaser, upon the faith and footing of such contract, shall have paid to the seller the purchase-money, or any part thereof, or having been let into possession of the property, shall, with the acquiescence of the seller, have made any substantial repairs or lasting improvements upon such property, and where in any such case either of the parties to such contract shall refuse to perform the same on his part, the other of the said parties shall or may maintain an action against the party so refusing for the recovery of the damage sustained by him by the payment of any such purchase-money, or by the expenditure in such repairs or improvements, or by the loss of the rents and profits or possession of the property sold, as the case may be; and in every such action brought by a seller, the defendant, the purchaser shall be at liberty to set-off against the plaintiff's demand the amount of any purchase-money paid to the plaintiff by the defendant, with interest thereon, at the rate of four pounds per centum per annum, and the amount, of any monies actually expended by the defendant in substantial repairs or lasting improvements on the estate of the plaintiff, with his acquiesence; and in every such action brought by a purchaser, the defendant, the seller shall be at liberty to set off against the plaintiff's demand the amount of any rents and profits of the property sold which shall have been received by the purchaser, or an occupation-rent for the property sold, where it shall have been in the plaintiff's own possession, as shall be just; and where any such agreement as last aforesaid is upon a letting, and the intended tenant having been let into possession by the intended landlord (the other contracting party), shall, upon the faith and footing of such contract, with the acquiescence of the landlord, have made any substantial repairs or lasting improvements on such property, and the landlord shall afterwards refuse to perform the agreement, in any such case the tenant may maintain an action against the party so refusing for recovery of the damages sustained by the expenditure in such repairs or improvements; and in such action, the defendant shall be allowed such set-off as shall be just; and the amount of the damages recovered in any such action by

a purchaser or tenant shall be and be deemed an equitable lien on the estate contracted to be sold or let, as and from the day on which such contract was entered into, and shall carry interest from the time the verdict is given; and in every such case as aforesaid, where a lien is to be established on the estate contracted to be sold or let, or where an account is to be taken between the parties, either party may file a bill in equity against the other for the purpose of enforcing the rights hereby given.

And whereas by the said Act of the twenty-ninth year of his late Majesty King Charles the Second, it is enacted, that no leases, estates or interests, either of freehold, of terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the four-and-twentieth day of June therein mentioned, be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing or by act and operation of law: And whereas it is expedient that assignments and surrenders of leases, estates or interests, of, in, to or out of any messuages, manors, lands, tenements or hereditaments which do not exceed the term of three years from the making thereof, may hereafter be made without any deed or note in writing; Be it therefore enacted, that from and after the
all leases of, in, to or out of any manors, messuages, lands, tenements or hereditaments, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term amounted at the time of the creation thereof to three-fourth parts at the least of the full improved value of the subject demised, may be assigned or surrendered without any deed or note in writing.

And whereas by the said recited acts it is further enacted, that all devises of lands, devisable either by the statute of wills or by custom, shall be in writing signed by the party devising, or by some other in his presence and by his express directions, and shall be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they shall be void: And whereas it is expedient to alter and amend the law as it is administered under the said statutes, in the respect last aforesaid; Be it therefore further enacted, that where any such devise as aforesaid in writing, shall, without fraud, be attested and subscribed by three or four credible witnesses as part of the transaction which they are called upon to witness, and before

they depart from the house or place wherein or whereat the will was signed by the testator, the same shall be deemed an effectual attestation within the said statutes, although not subscribed in the actual presence of the devisor, or where he might see the witnesses subscribe the same.

And be it further enacted, that this act shall operate on all such agreements and deposits as aforesaid only as shall be made after the passing of this act, and upon all such devises as aforesaid only where the devisors making the same shall die after the passing of this act.

No. XII.

Ex parte Tomkins (*t*), *L. I. Hall,* 23*d August* 1816.

A mortgagee obtained an order for sale of the estates under a bankruptcy. The assignees, without leave of the Court, appointed several puffers to bid, and two lots were knocked down to them. Lord Eldon determined that they must be held to their bargain, although they swore that they believed there was no real bidder. And in answer to an application, that if there should prove to be a real bidder, the assignees might only be compelled to pay the price which he bid, the Lord Chancellor said, that although it was a hard case, they must pay the sum at which the lots were knocked down. The order was for a *sale,* and they were not authorized to buy the estate in; their biddings might have prevented the estate from selling to a *bonâ fide* bidder, and it was impossible for the Court to say that the estate would not have fetched more than the last real bidding, if the puffer appointed by the assignees had not afterwards bid. A majority of the creditors in such a case could not bind the rest, and if assignees choose to act, they ought to procure an indemnity from the creditors.

No. XIII.

Observations on the Annuity Act (*u*).

To this passage a note was added in a former edition, in which it was contended that the 17 Geo. III. c. 26, commonly called

(*t*) *Vide supra,* vol. 1, p. 73. (*u*) *Vide supra,* vol. 1, p. 231.

the Annuity Act, extended to money considerations only, notwithstanding the case of Crosly *v.* Arkwright, 2 Term Rep. 603. The authorities relied on, were Crespigny *v.* Wittenoom, 4 Term Rep. 790; Hutton *v.* Lewis, 5 Term Rep. 639; *Ex parte* Fallon, 5 Term. Rep. 283; and Horn *v.* Horn, 7 East, 529; to which might be added Doe *v.* Philips, 1 Taunt. 356. But the point is not now of much importance. The decisions under the Annuity Act had gone far beyond the letter, and in many cases even beyond the spirit of the law: and perhaps there was not any act in the statute-book on which so many cases had been decided within any thing like the same space of time. The expense of the memorial was very considerable, and the effect of the decisions, by increasing the risk of the transaction, drove fair purchasers out of the market, and lowered the price of life annuities; first, because the number of buyers was small; and secondly, because the purchasers required to be paid not only the common rate of annuity interest, but also the value of the risk of the transaction being void under the act. The Annuity Act, after having been thirty-five years in operation, was repealed by the 53 Geo. III. c. 141, except as to annuities granted before the passing of the repealing statute; and other provisions were substituted in lieu thereof.

The first section repeals the old act.

The second section requires, that within thirty (in the old act it was *twenty*) days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of the act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument or other assurance, shall be null and void to all intents and purposes.

FORM OF ENROLMENT.

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent Charge to be beneficially received.	Person or Persons for whose Life or Lives the Annuity or Rent Charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent Charge.
10 Aug. 1829.	Indentures of Lease and Release.	*A. B.* of one Part. *C. D.* of the other Part.	*E. F.* of - *G. H.* of -	*C. D.* - - -	*A. B.* - - -	£. 100. paid in Money. £. 500. paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£. 100. a year.
Same Date.	Bond in Penalty of £. 1,200.	*A. B.* to *C. D.* - -	*E. F.* - - *G. H.* - -	For securing the same Annuity or Rent Charge.			
Same Date.	Warrant of Attorney to confess Judgment on the same Bond.	*A. B.* to *I. K.* and *L. M.* Attornies of Court of King's Bench.	*E. F.* - - *G. H.* - -				

The great object of this provision was to give publicity to the transaction, and at the same time to avoid unnecessary expense to the grantor; and by the simplicity of the memorial to avoid, if possible, future litigation. As the act passed the House of Commons, the memorial was required to contain only four things, viz. 1. the date of the grant; 2. the name of the grantor; 3. the name of the person by whom the annuity was to be beneficially received; and 4. the amount of the annuity. The statement of the consideration was omitted, lest it should open a door to the mischiefs which the act was intended to guard against. The schedule stands as it was amended in the House of Lords. The nature of the instrument is required to be stated, to which there can be no particular objection, although it is not mentioned in the body of the act. The next amendment substitutes the names of the parties for the name of the grantor. This seems open to objection, for in many cases it may not appear who is the grantor: for example, if Richard is possessed of a lease in trust for Edward, and Edward sells an annuity to Frederick, the deed would, in the ordinary course, be made between Richard of the first part, Edward of the second part, and Frederick of the third part, and thus the memorial would stand; from which it would be inferred that Richard and not Edward was the grantor. The provision in the act, as it passed the House of Commons, was not open to this objection. The third column requires the *names* of the parties simply to be stated, and does not seem to require their additions to be inserted, but in the next column where the *names* of the witnesses are required, a blank is left in the example, manifestly for the addition, "*E. F.* of ." In complying with both these requisitions, the additions of the persons should be inserted, and this is expressly required in the latter instance. This fourth column was an amendment in the Lords. In the late case of Darwin *v.* Lincoln, 5 Barn. & Ald. 444, it was held that a witness described in the memorial as the clerk of the attorney was not well described, because his place of abode was not stated. This led to the passing of another Act of Parliament, which will presently be noticed.

The memorial must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient. Cheek *v.* Jeffries, 2 Barn. & Cress. 1, and this has been followed in a late decision upon an annuity granted by Lord Strathmore. It would be prudent to state

which of the several executions the witnesses attested. It is sufficient to state, that the annuity was granted for the lives of *A. B.* &c. without stating more than their names, or adding that the annuity was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. Barber *v.* Gamson, 4 Barn. & Ald. 281. Another amendment requires the statement of the consideration *and how paid.* The latter words it was at first thought might be understood, *in what manner*, which would lead to all the inconveniences intended to be remedied, but it now seems agreed, that the words are not open to that construction: the meaning is, that the amount of the consideration shall be stated, and whether paid in money, notes, bills, &c. This is clear from the explanation in the act; it need not therefore be stated by or to whom the money was paid, and there is now no exception to the rule that a payment by an agent is a payment by the principal. It is observable that the amendment requires the *pecuniary* consideration or considerations to be stated. Perhaps it escaped observation, that the act extends as well to annuities granted for money's worth, as for money; but as the act stands, it is clear that none but money considerations need be stated in the memorial. It has been decided in James *v.* James, 2 Brod. & Bing. 702, (and see Blake *v.* Attersoll, 2 Barn. & Cress. 875; Tetley *v.* Tetley, 4 Bing. 214,) that an annuity granted in consideration of a conveyance of a life interest in land does not require enrolment. The Court said that the words in the tenth section, declaring that the act shall not extend "to any voluntary annuity granted without regard to pecuniary consideration or money's worth," import that money's worth may, in certain cases, be "a pecuniary consideration" within the meaning of the act; as where the grantee pays for the annuity in part, or in whole, by goods or merchandize, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor, and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised. But considering the second and tenth sections together, and the intent of the Legislature as it is to be collected therefrom, the Court was of opinion that the act does not extend to cases of fair and *bonâ fide* sale of landed property, whether freehold for life or leasehold for term of years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity, being

an estate in land *bonâ fide* sold and conveyed, did not appear to the Court to be a pecuniary consideration or money's worth within the meaning of the statute.

A description in the memorial of an underlease of leaseholds as an assignment, is a sufficient compliance with the act, which is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect. Butler *v.* Capel, 2 Barn & Cress. 251.

The form of the memorial is the only part of the act in which any substantial amendment was made in the House of Lords.

It has been decided, that the memorial need not state that the annuity is redeemable. That clause does not come within the schedule, and as Abbott, C. J. remarked, if any thing not specified in the schedule be necessary, the schedule itself would be worse than useless. The name of the party in whose favour a warrant of attorney is given need not be stated in the memorial; Yems *v.* Smith, 3 Barn. & Ald. 206; nor is it necessary to state for what penal sum it authorizes a confession of judgment. Barber *v.* Gamson, 4 Barn. & Ald. 281.

The third section provides. that if any such annuity shall be granted by, or to or for the benefit of any company exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial to describe such company by the usual firm or name of trade.

The fourth section enacts, that in every deed, bond, instrument or other assurance, whereby any annuity or rent charge shall, from and after passing of this act, be granted or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intended to take the annuity beneficially, shall be described in such or the like manner as is hereinbefore required in the enrolment; otherwise every such deed, instrument or other assurance shall be null and void.

The object of this provision was to prevent one person from secretly buying an annuity in the name of another. It was thought right that the grantor should know with whom he was dealing: in all other respects an annuity deed is now placed on the same footing with other deeds. This is a great point

gained. If the consideration is money, it must be correctly stated under the last stamp act; if it is stated as a money consideration, and any part is paid in goods, the annuity, as we shall presently see, may be set aside.

The fifth section enables the grantor to obtain a copy of the deeds by a Judge's summons.

The sixth section enacts, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; *or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods*; or if the consideration or any part of it shall be retained, on pretence of answering the future payments of the annuity or rent-charge, or any other pretence; in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, *or whose property is liable to be charged or affected thereby*, to apply to the Court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered, by motion, to stay proceedings on the action or judgment, and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, instrument or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated. See Barber *v.* Gamson, 4 Barn. & Ald. 281.

This is similar to a provision in the old act, with the addition of the words in italics, and the power is enlarged to cancel *every* security for the annuity.

The seventh section provides, that a book shall be kept for the enrolment of the memorials, 20*s.* to be paid for the entry of the memorial, 1*s.* for every certificate of entry and copy, and 1*s.* for every search.

The eighth section renders void contracts with infants, and the ninth punishes brokers taking beyond 10*s.* per cent for brokerage. These provisions are copied from the old act.

The tenth and last section enacts, that the act shall not extend *to Scotland or Ireland*, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement

of a child, nor to any annuity or rent charge secured upon *freeholds or copyhold or customary lands, in Great Britain or Ireland, or in any of His Majesty's possessions beyond the seas,* of equal or greater annual value than the said annuity, *over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant,* whereof the grantor is seised in fee simple or fee tail in possession, *or the fee simple whereof in possession, the grantor is enabled to charge at the time of the grant,* or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration *or money's worth*; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament.

This is copied from the old act, with the additions in italics; the additions require no explanation, and, I believe, meet all the questions which arose on the provision in the repealed act. The provision in the old act, which excepted out of its provisions annuities not exceeding 10*l.* was not inserted in the new one. The practice with professed money lenders was to split the consideration into several parts, and make the man wanting the money grant 10*l.* annuities to different persons, to the amount agreed upon. By this plan they increased the expenses of the grantor to a considerable amount, and at the same time avoided giving publicity to the transaction.

In considering the operation of the new act, it will be necessary for the reader to keep in view the circumstance, that it extends to annuities, although not exceeding 10*l.*, and also embraces annuities granted for money's worth. As to the latter, see James *v.* James, before cited.

In consequence of the decision before referred to in Darwin *v.* Lincoln, the act of the 3 Geo. IV. c. 92, was passed. By that act, after reciting the second section of the act of the 53d of Geo. 3, and that the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words "Names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words, "*E. F.* of " "*G. H.* of ," and as applicable to a bond and warrant of attorney to confess judgment, the letters "*E. F.*" "*G. H.*" without the word "of;" and reciting, that the words of enactment referring to such form express only that a

memorial of the names of all the witnesses to every such deed, bond, instrument or other assurance as therein mentioned, should be enrolled as directed by the said Act, without providing that any description of the witnesses should be given in such memorial, except as such form is thereby referred to; and such form does not provide that any description should be added to such names except by the addition of the word, "of" to the letters "*E. F.*" and "*G. H.*" as aforesaid, as applicable to indentures of lease and release; and reciting, that in consequence of such indistinct enactment it might be doubtful whether it was the intention of the Legislature to require any, or if any, what description to be added to the names of witnesses in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid; and reciting that a very great number of memorials of grants of annuities had since the passing of the said act been enrolled, in which the names of the witnesses to the deeds, instruments or assurances specified in such memorials, had been inserted without the addition of the place of abode of such witnesses, and it has been inferred from the use of the word "of" after such letters "*E. F.*" and after such letters "*G. H.*" as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place, and in consequence thereof some grants of annuities made since the passing of the said act had been, in proceedings in summary applications to courts of justice which could not be reviewed in any superior court, deemed null and void, on the ground that no description of the place of abode of the witnesses to some or one of the deeds, instruments or assurances by which such grants of annuities had been made, had been inserted in the memorials or memorial thereof enrolled as directed by the said act; and also reciting, that doubts had been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal as renders deeds, instruments and assurances, of which memorials had not been enrolled in pursuance of the said act, null and void; and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities might have been thereby misled and induced to conceive that it was not necessary, under the provisions of the said act, to insert in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument or assurance, or any more than the name or names of such witness or witnesses, there

being no words in the said act expressly requiring any more to be so inserted, nor any words from which it could be inferred that any more was required to be inserted, except the word "of" after the letters "*E. F.*" and "*G. H.*" respectively, with reference to one species of assurance, inserted in the form of memorial before mentioned, and that it was expedient to remove all doubts touching the construction of the said act with respect to so much of the memorials required by the said act to be enrolled as relates to any description of the witness or witnesses to any deed, instrument or assurance; it is enacted, that by the said act of the 53d year of the reign of his said Majesty Geo. 3, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed and taken. *See* St. John *v.* Champneys, 1 Bingham, 77. And by the same act (*x*), after reciting that doubts had also arisen whether under the said act of the 53d year of the reign of his said Majesty Geo. 3, the omission to enrol a memorial of any of the assurances for securing any annuity or rent-charge did not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument or other assurance granting the same (I); and that it was also expedient to remove such doubts, it was enacted and declared that every deed, bond, instrument or other assurance granting any annuity or rent-charge, and of which a memorial shall have been or shall be duly enrolled pursuant to the said act, notwithstanding the omission to enrol any other deed, bond, instrument or assurance for securing such annuity or rent-charge, shall be valid and effectual according to the intent, meaning and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument or assurance for securing the same annuity, shall not have been duly enrolled pursuant to the said act.

And by the same act it is provided (*y*) and enacted, that nothing in the said act contained shall extend to give any other force or validity to any deed, bond, instrument or other assurance of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument or other assurance would have had if any deed, bond, instrument or other assurance for securing

(*x*) Sect. 2. (*y*) Sect. 3.

(I) This is singular; for the former act expressly authorizes every security to be cancelled.

the same annuity, of which a memorial shall not have been duly enrolled, had never been executed.

And by the said act it is also provided (*z*) and further enacted, that the said act shall not extend or be construed to extend to revive or give effect to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge hath been already granted, so far as the same hath been adjuged, declared, treated or deemed void by any judgment, decree, action, suit or proceeding at law or in equity, or by any act or deeds of the parties thereto, or by any other legal or equitable means whatsoever; nor shall the said act affect or prejudice any suit or proceeding at law or in equity commenced on or before the 31st day of May 1822, and now depending, upon the ground of an alleged defect in the memorial thereof in not describing the witnesses thereto otherwise than by his her or their name or names, for avoiding any such deed, bond, instrument or other assurance.

The current of judgment is now altered, and a fair and liberal construction is put upon the acts in favour of *bonâ fide* transactions. See Faircloth *v.* Gurney, 9 Bing. 622.

No. XIV.

Coussmaker v. *Sewell* (*a*), *Ch. 4th May* 1791.

In this cause it was referred to Master Greaves to see if a good title could be made to the estate in question. An abstract was delivered. It appeared by it, that William Perkins, an ancestor of the vendor, had made a settlement of his estate in the year 1705; but neither the settlement itself, nor any copy or abstract of it, could be produced, and the contents of it were totally unknown. In 1751 a fine was levied by Mr. Perkins and his eldest son; and in 1763 a recovery was suffered, in which Mr. Perkins and his second son (the eldest son being then dead) joined in making a tenant to the *præcipe*, and the second son was vouched. The estate was mortgaged in 1759, and the title was then approved of by Mr. Serjeant Hill; and from the wording of his opinion, it was collected, that the settlement of 1705 was then before him. Supposing the limitations in the settlement of 1705 to have been to the sons of that marriage successively in tail male, those estates-tail, and the remainders expectant upon them (if any) were completely barred by the fine and recovery.

(*z*) Sect. 4.

(*a*) *Vide supra*, Vol. 1, p. 356.

The counsel for the purchaser objected to the title, on the ground that the deed of 1705 was not produced, and that it might contain limitations which were not barred by the fine and recovery; and might have created charges to which the estate still continued subject.

These objections were laid before the Master; and the vendor not acquiescing in them, they were argued before him. The counsel for the purchaser avowed his client to be an unwilling purchaser, and stated his objections with great perspicuity and ability, and required of the Master, that if he did not think the title such as a court of equity was warranted to *force* on an unwilling purchaser, he should not report in favour of it. The original opinion of Mr. Serjeant Hill could not be produced, and the serjeant had not that recollection of what was before him at the time he gave the opinion, as enabled him to say that he had seen the settlement. Much stress was not, therefore, laid upon the opinion. On the 21st February 1791, the Master made his report, in which he stated that he had seen the opinions given by Mr. Serjeant Hill and by Mr. Shadwell, the purchaser's counsel; and that, considering the circumstances of the case, and the length of the possession since the recovery, he was of opinion a good title might be made. To this report the purchaser excepted, and the exceptions were argued before the Chancellor on the 4th May 1791, by Sir John Scott, with great earnestness; but the Chancellor over-ruled them, and the report was confirmed.

No. XV.

Clay v. *Sharpe*, *Ch. Mich. Term*, 1802 (*e*).

By indenture, bearing date the 28th of November 1798, and made between Thomas Wardell of the first part, George Taylor and Ann his wife of the second part, E. Day of the third part, and William Sharpe of the fourth part, certain leasehold estates were assigned unto the said Edward Day, his executors, administrators and assigns, subject to a proviso or condition for redemption, upon Wardell's transferring into the name of Day, his executors, administrators or assigns, 2,000 *l.* 3 per cent. consolidated Bank annuities. And it was by the indenture agreed, that if default should be made contrary to the proviso or condi-

(*e*) *Vide supra*, vol. 1. p. 358.

tion of redemption, it should be lawful for the said defendant, Edward Day, to sell the said leasehold premises for the best price that could be reasonably gotten for the same; and to reimburse himself the costs, charges and expenses relating to such sale; and afterwards to re-purchase the said 2,000 *l.* 3 per cent. consolidated Bank annuities, or such part thereof as should remain due or untransferred; and the overplus of the monies to arise by the said sale, if any, to pay to the said Thomas Wardell, his executors, administrators or assigns. And the said Thomas Wardell did, by the said indenture, covenant, that in case of any sale pursuant to the power aforesaid, he the said Thomas Wardell, his executors or administrators, would join and concur therein, and execute any assignment to the purchaser or purchasers of the said premises, with the usual covenants for the title thereto; or do any reasonable act confirming such sale. But that, nevertheless, it should not be necessary that the joining of the said Thomas Wardell in any such sale or conveyance, should be essential to perfect the title, the same being intended only for satisfaction of such purchaser or purchasers.

Default was made in transferring the stock, and Day, who was a trustee, by Sharpe's directions, put up the premises for sale by public auction, at which sale the plaintiff became the purchaser.

The plaintiff's attorney prepared a draft of the assignment, in which he made Day the mortgagee, Sharpe the *cestui que trust*, and Wardell the mortgagor, parties; but Wardell the mortgagor having refused to execute the assignment, the plaintiff filed his bill against Day, Sharpe and Wardell, for a specific performance of the contract for sale.

To this bill the defendants put in their answers, and Wardell stated that he resisted the sale, as having been made without his consent, and at an undervalue; but before any proceedings were had, Wardell became a bankrupt, and in consequence thereof a supplemental bill was filed against his assignees.

The cause coming on to be heard the 15th of November 1802, the Chancellor decreed that the plaintiff's bills should be dismissed as against the defendants, Thomas Wardell, and his assignees, *with costs*, to be taxed by the Master. And it was also decreed, that the agreement entered into by the plaintiff with the defendants William Sharpe and Edward Day, for the purchase of the premises in question, should be carried into execution. And that upon the plaintiff paying unto the said de-

fendants William Sharpe and Edward Day, the residue of the purchase-money for the premises, the said defendants should execute an assignment of the lease of the said premises to the plaintiff, or as he should appoint. And that the defendants Sharpe and Day should pay to the plaintiff his costs of the said suit, so far as the bills were not dismissed, as thereinbefore directed, to be taxed by the Master, in case the parties differed about the same.

No. XVI.

Belch v. *Harvey* (*f*), *Ch. Mich.* 9 *Geo. II.*

This cause was very long and intricate; but the chief question was, what length of time would bar an equity of redemption? And as to that point, Talbot, Lord Chancellor, said that courts of equity had of late years generally adhered to the time laid down in the statute of limitations with regard to ejectments, and that it was certainly right to have fixed rules in equity as well as law, that people might know how far their property extended, and where it was bound; and that he did not know any more reasonable rule in general than what the Legislature had prescribed for such possessory actions. The person claiming the equity of redemption offered some proof out of the Ecclesiastical Court to show she was an infant at the time of her marriage, which was not allowed to be read, and other proof that the marriage continued for many years, both which, taken together, would excuse the non-redemption for a long time; but my Lord Chancellor gave her liberty to file an interrogatory to prove her infancy at the time of her marriage, if she could; and said, he would then consider whether equity had also followed the statute of limitations in allowing only ten years for infants and *femes covert* to commence their suits after the imperfections removed, for he did not remember the Court had pursued that part of the statute; and Mr. Verney, king's counsel, cited the case of *Brewer* and *Bakerstraw*, which he believed to be about five years ago, where the father mortgaged some chambers in Gray's Inn, and died, leaving his son an infant, during which time many years were saved; and yet nineteen years after he was come of age he was permitted to redeem. But to this Mr. Fazakerly answered, there was as much reason for observing it in the one

(*f*) *Vide supra*, vol. 1. p. 395.

case as the other; and that, in the present case, thirteen years had passed between the death of the husband and the bill filed for a redemption. This was on a supposition she could prove her infancy at the time of her marriage; for if she was then of full age, my Lord Chancellor said, the time would attach and run out against her, notwithstanding the subsequent marriage, and then she would be put off from all possibility of relief, for there would be near forty years possession against her unaccounted for. By statute 21 Jac. 1. c. 16, persons having any right or title of entry must enter within twenty years after titles accrued; but the title of infants, *femes covert*, &c. are saved, so as they commence their suits within ten years after the imperfection removed.

This cause coming on again the same term, was ended by consent of the parties: but Lord Chancellor Talbot spoke, however, in this case, to this effect: A peaceable and quiet possession for a long time weighs greatly with me in all cases. The foundation which the Court goes on in cases of the like nature with the present, is not any presumption, that after a long space of time the party has deserted his right; but to quiet and secure men's possession, which is very reasonable to be done after twenty years time, without some very particular circumstances: and for this cause a court of equity has generally acted in conformity to the statute of limitations. Whether the present plaintiff was an infant at the time of her marriage is to me very doubtful; but taking it she was then an infant, as the Court has not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clauses of the statute, so if I had been forced to have made a decree in the present case, I should have been of opinion, that after the disability removed, the time fixed for prosecuting in the proviso, which is ten years, should also have been observed: for the proviso containing an exception of several cases out of the purview of the statute, if the parties at law should avail themselves by the proviso, they must take it under such restrictions as the Legislature hath annexed to it, and that is, to sue within ten years after the impediment ceases. Why should not the same rule govern in equity? I think there is great reason that it should. The persons who are the subject of the proviso are not disabled from suing, they are only excused from the necessity of doing it during the continuance of a legal impediment; therefore when that difficulty is removed, and nobody can say

how long it may last, the time allowed after such impediment removed for their further proceedings should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms such excuse is given? If I had given my opinion on this case, I should have dismissed the bill.

No. XVII.

The King against John Smith, Esq. (*a*), *Serjeants' Inn Hall, March* 2, 1804.—*The judgment of the Court, as delivered by the Lord Chief Baron.*

This case of the King against Smith has occupied a great deal of the attention of the Court, and that in a great degree owing to the prodigiously extensive consequences that it may have according as it is decided in the one way or the other. We were therefore anxious to search in order to find out what materials existed on the subject. After all the pains we could take, we find them to be but few. We have found no decision or authority similar in its terms to the present case; and the consequence of that is, where we can find principles laid down, we must be governed by them in the absence of every direct precedent on the subject. The magnitude of the question is very considerable, because, on the one hand, from some instances of persons in the service of government, and who have been intrusted with the public money, I have experience enough to say, that the ingenuity exercised by them may be such as not to make it very difficult to avail themselves of their situation, and to render it no easy matter to make them responsible; on the other hand, it puts those who make purchases from persons in such a situation in a very unpleasant and precarious situation, if the lands or goods so purchased may be extended. In this view the question is of very great importance. The stake in the present instance is next to nothing; but the decision will be such as will govern multitudes of cases that exist, and I believe many to exist of the same sort.

This case arises on an extent that was issued against John Montresor, Esq. late engineer in the service of government, in North America, who owed vast sums to government. It was found that a great balance remained in his hands which he had not accounted for. The extent issued to the sheriff of Kent—that you diligently inquire what lands and tenements, and of

(*a*) *Vide supra*, vol. 1. p. 511, 512. n. 514, 515.

what yearly value, the said John Montresor had in your bailiwick on the 28th of September, in the eighteenth year of our reign, when the said John Montresor first became indebted to us in the said money, or at any time after; in the common language.

An inquisition is returned of course, and in the inquisition it is stated that the sheriff seized, &c.

Without going minutely into all the circumstances of this case, I believe I can state from memory, the leading facts upon which the question depends. The property now in question, which consists of a small messuage, and of some closes of land, originally belonged to a Mr. Thompson. He being seised of this property demised it for the full term of five hundred years; the residue of this term was afterwards assigned to Ann Carter; and last of all to John Smith, the present defendant, in trust. And in 1795, Mr. Smith purchased the reversion of General Montresor, he being then seised of this property in his demesne as of fee subject to this term of five hundred years; and at the time of the purchase Mr. Smith had no notice of any debt that had been incurred by John Montresor to the King.

This is the short state of the case, and I believe it is all that is necessary: and the question then is, whether this outstanding term, which is held in trust for Mr. Smith, does or does not protect him against the claim of the Crown?

The argument on behalf of Mr. Smith turned almost entirely on the statute of uses in courts of equity, and besides that on the doctrine laid down in Willoughby against Willoughby, which has never been shaken, and which I hope never will. I take that now to be a leading decision, never to be departed from in cases between subject and subject.

In answer to this case, made on the part of the defendant, irrefragable as between subject and subject, in answer to this case, it was argued, that the case of the Crown is essentially different from that of the subject; and as far as we are furnished with light on this subject, it does seem that the case of the Crown is essentially different.

In the first place, we find from a variety of authorities, that lands or goods in the hands of debtors or accountants to the Crown, or in the hands of those who are debtors to the debtors of the Crown, or which are held in trust for them, or to their use, are most clearly the subject of an extent.

Further, we find in Pl. Com. 321, in the great case of the mines in the hands of the Crown, there was a great number of

the king's debtors brought into the Court of Exchequer, and there the Court held, that lands which had belonged to the king's debtors, which had been their property after they had so become debtors to the Crown, were subject to the seizure of the king, into whatever hands they afterwards came, whether by descent, purchase or otherwise. Among other cases there cited, is that of Sir Wm. Seyntloo, who married the widow of Sir Wm. Cavendish, who was treasurer of the household. Sir Wm. Seyntloo and his lady were returned terre-tenants, in right of the wife, of certain land which was Sir Wm. Cavendish's, and were called into the Court of Exchequer, and made accountable for the arrears due to the queen for Sir William's office. See Dyer, 224 and 225. It appears from the case, that after Sir William Cavendish became indebted to the Crown, he purchased divers lands, and afterwards aliened them, and took back an estate therein to himself and his wife, and afterwards died without rendering any account, and the terre-tenants (as I have just stated) of the land were charged to answer to Queen Elizabeth for the arrears. These lands might have been seized in the hands of Sir William, and for the same reason they might be seized in the hands of every one who came under him.

In 2 Roll. Ab. 156, the difference is stated between the effect of a sale of land by a debtor to the Crown, when that sale took place before he became a debtor, and a sale afterwards. In Dyer, 160, there is the case of one Thomas Favell, who was a collector of the fifteenth and tenth. He was indebted to the Crown, and being seised of certain lands in fee simple, and having divers goods and chattels, *die intromissionis de collectione et levatione*, of the fifteenth and tenth aforesaid, in extremity of illness aliened his tenements, goods and chattels, to divers persons, and died without heir or executor, and process was issued against the terre-tenants, and possessors of the goods and chattels, to account for the collection aforesaid, and to answer and satisfy the king thereof, &c.; and this by the advice of the Chancellor of England, and the Chief Justice of England, and the other Judges of either bench. It is therefore clear, beyond all doubt, that the land itself may be extended, into whatever hands that land may have been aliened.

The next step which we find in a matter of this kind, is the doctrine which is laid down in Sir Edward Coke's case, and which is mentioned afterwards by Lord Hale in deciding another case, which I shall state by and by. This case of Sir Edward

Coke being of great consequence, the Master of the Court of Wards was assisted by four of the Judges in the hearing and debating of it; and after many arguments at the bar, the said four Judges argued the same in court, viz. Dodderidge, one of the Justices of the King's Bench; Tanfield, Lord Chief Baron of the Exchequer; Hobart, Lord Chief Justice of the Court of Common Pleas; and Ley, Lord Chief Justice of his Majesty's Court of King's Bench.

First of all, I would draw your attention to this point, that this is an infinitely stronger case than any of those I have stated. In general, the debtor to the Crown was at one time in possession of the land himself; but in this case the king's accountant never had the land in him, the land and debt never centered in the accountant to the Crown.

The case in effect was this:—Queen Elizabeth, by her letters patent, did grant to Sir Christopher Hatton the office of remembrancer and collector of the first fruits for his life, *habendum* to him after the death or surrender of one Godfrey, who held the said office, then in possession: Sir Christopher Hatton being thus estated in the said office in reversion, and being seised in fee simple of divers manors, lands and tenements, did covenant to stand seised of his lands, &c. unto the use of himself for life, and afterwards to the use of J. Hatton, his son, in tail, and so to his other sons in tail, with remainder to the right heirs of J. Hatton in fee, with proviso *of revocation*, at his pleasure, during his life. Godfrey, the officer in possession, died, and Sir Christopher Hatton became officer, and was possessed of the office, and afterwards he became indebted to the queen by reason of the said office; and the question in this great cause was, whether the manors and lands which were so conveyed and settled by Sir Christopher Hatton, might be extended for the said debt due to the queen, by reason of the proviso and revocation in the said conveyance of assurance of the said manors and lands. The debt due to the queen was assigned over, and the lands were extended, and the extent came to Sir Edward Coke; and the heir of John Hatton sued in the Court of Wards to make void the extent; and it was agreed by the said four Justices, and so it was afterwards decreed by Cranfield, Master of the Court of Wards, and the whole Court, that the said manors and lands were liable to the said extent.

The Judges on that occasion cite a great number of cases, and some of them go a great deal farther than I could have well

expected. I shall just mention two or three of them, and it will be unnecessary to state more. One of the cases there cited is, that of *Walter de Chirton*, customer, who was indebted to the king 18,000 *l.* for the customs, and purchased lands with the king's money, and caused the feoffor of the lands to enfeoff certain of his friends, with an intent to defraud and deceive the king; and notwithstanding he himself took the profits of the land to his own use, and those lands upon an inquisition were found, and the value of them, and returned into the Exchequer, and there, by judgment given by the Court, the lands were seized into the king's hands, to remain there till he was satisfied the debt due to him; and yet the estate was never in him; but because he had a power (to wit), by subpœna in chancery, to compel his friends to settle the estate of the lands upon him, therefore they were chargeable to the debt. See Dyer, 160. Walter de Chirton, in that case, never was seised of the said lands; Chirton had no remedy in law to have the lands, but his remedy was only in a court of equity.

Another case is that of Philip Butler, who was sheriff of a county; and being indebted to the king, his feoffees were chargeable to the king's debt by force of the word *habuit*, for *habuit* the lands in his power. In Morgan's case, it was adjudged, that lands purchased in the names of his friends to his use, were extendable for a debt due by him to the king.

There are several other cases cited in Sir Edw. Coke's case, and which are also mentioned by Lord Hale in the case to which I have already alluded. In a great many of these cases, the lands that were seized for the payment of debts due to the Crown had been held in trust for the king's debtors; and it was no objection that the legal estate was not in them. The ground of decision there was, that they, by an act of their own, might at any time reduce it into possession; they had it in their power, viz. by a subpœna in chancery, &c. to compel their friends to settle the estate of the lands upon them, and therefore they were made chargeable to the debt.

This being an outstanding term held in trust, it is analogous to all the cases of uses and trusts. It was held there to be no objection, that the legal estate was not in him, because it was in his power, by an act of his own, to reduce it into possession.

But the case that comes nearest to the present is that of the Attorney-general against Sir George Sands.

Upon an information exhibited here, and proceedings upon it,

a case was made and stated, which was to this effect, viz. Sir R. Freeman purchased lands for the term of ninety-nine years, in his own name, and afterwards purchased the inheritance of the same lands in trust, and then by his will disposed of these lands to the sons of Sir George Sands, his grand-children, born, or which should be born in his life-time, and directed conveyances to be made accordingly by his trustees, and died. At that time Sir George Sands had two sons, Freeman and George, and Freeman died; and after the death of Sir Ralph, Sir George had another son, Freeman, who killed his brother George, for which he was attainted and executed, and no conveyances were made by the trustees, pursuant to Sir Ralph Freeman's will; and the questions hereupon were two: 1st, Whether, as this case is, the term for years was forfeited? 2dly, Whether or no the inheritance in trust was forfeited?

The result in this case was, that, inasmuch as there did not appear to be a tenure, there could be no forfeiture for the felony; because to a forfeiture for felony, and to an escheat, a tenure is requisite, and therefore judgment was afterwards given *quod defendens eat inde sine die.*

This case of Sir George Sands is reported in Hardres, 488, and also in Freeman. I mention this case with greater confidence, because, though Lord Mansfield, in the case of Burgess against Wheate, 1 Blackst. Rep. 123, observes, in delivering his judgment, that it was a family business, and that the circumstances of Sir Geo. Sands' case were compassionate; yet I have the authority of Lord Keeper Henley for saying it was decided on great principles of law.—Having this authority with me at this great distance of time, I conceive it gives it the description I have now mentioned.

Hale, Chief Baron, says, there is no question concerning the forfeiture of the fee simple in trust, for that must arise by escheat, and there can be no escheat, but *pro defectu tenentis.* But here is a tenant *in esse.* If the offence committed had been treason, then there might have been a question, whether the inheritance in this case should be forfeited, in respect that the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the king shall have the term, is the sole doubt. The king does not gain an interest in a trust by forfeiture, as he does in debt; for there the interest of the bond passes to the king, and process lies to execute it in the king's own name. And it is question-

able, whether the king can have this in point of prerogative, in case of felony; though perhaps more might be said, if the case had been treason. It is the intention of the party that creates and governs uses and trusts; and therefore a lease shall be deemed to attend the inheritance, if it appears the parties intended it should do so, as here it does; and then it is no more than a shadow, an accessary to it, for otherwise it would not be attendant on it. And then it cannot, in this case, go to the felon, but to the administrator of George, the son. And here they are consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly. Nor is it kept on foot, but only to avoid mesne incumbrances, which might affect the inheritance. And this appears to have been the intention of the parties when the fee was purchased, and therefore the lease ought to go with the fee; and in the cases of leases for years in trust, that have been forfeited, fraud was the ground of it in the cases that have been cited.

Lord Hale says on another occasion, (for this case was twice spoken to by the Court,) I agree, that in the case of the king's debtor, lands in trust for him in fee simple are liable to the king's debt by the common law, *per cursum scaccarii*, which makes the law in such cases; and this appears by precedents *temp.* Henry VI.; and before 4 Henry VII. a trust or use was liable to a statute; and that is the reason of Chirton's case in 50 Ass. And it was held, in Sir Edward Coke's case, in *Curia Wardorum*, that if the king's debtors have a power of revocation, that makes them liable to the king's debt; and that was the reason of Babington's case, in *Curia Wardorum*, in 30 Car.; and of Hoad's case, in *Pasch.* 4 *Jac.* where lands in trust for a recusant were subjected to the debt of 20*l. per mensem:* so, in 41 Eliz., Babington's case, a trust liable to a debt imprest, because *cestui que trust* has a profit by it, but that is a special case, and grounded on a special course in the Exchequer. He proceeds to state many other cases, which I think it unnecessary to mention.

If you take the converse of this case, I think it will make it still more clear. The reason why the term was not forfeited, was, because the inheritance thereof was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. In deciding according to the course of the common law, I therefore think it clear that an outstanding term cannot defeat the king's process by extent. In courts of equity, it has been said that a purchaser without notice is a person favoured by

that Court. Perhaps it may be a sufficient answer to say, that in the present instance we are not in a court of equity. The question is, What ought to be our decision according to the common law? This question could not be decided in a court of equity: they could not sue for a decree. When a court of equity is resorted to, and this is the situation of the parties, the Court does nothing but stand neuter between such parties, and leaves them to make the most of it.

Now, therefore, I think, on the whole, in the first place, the land is chargeable that has been in the hands of the king's debtors; and from the cases that have been decided, it is sufficiently clear that the term is; it is the whole interest in the land, whether it be divided or not: and so likewise in uses and trusts; and from what is said by Lord Hale, I infer the same doctrine is applicable to the actual case now before us.

It was hinted, that the 33 Hen. VIII. c. 39, sect. 50, 53, and 74, puts the king's debts on the same footing as a *statute staple*; but we find the same difficulty again recurs, for the 33d of Hen. VIII. does not alter the subject out of which the thing is to be paid. If I suppose, in the present instance, they are put on the same footing with statutes staple, the question would return; supposing the king has a debt upon bond, which is to be treated as a statute staple, I do not find the act meddles with the subject out of which he is to compel the payment of his debt, but the act relates singly to the mode by which he is to do it; and if the king were to put it on the footing of a statute staple, it would deprive him of no remedy which the common law gave him. The subject is not at all touched by the statute, but merely the manner in which he is to proceed, which perhaps gives the subject rather more advantages than he had before, though I do not see very clearly in what respect the situation of the king's accountant is altered.

Now that being so, it should seem to be the result of what one finds in the books, that of the king's common-law remedy it is impossible to doubt; and that remedy is given in every case where the party who is indebted to the Crown has a present beneficial interest, as well as a reversion: both of these are considered as chargeable for the debt of the Crown; the lands of the king's debtor may be extended by the Crown, in whatever hands they may be found, and therefore, upon the whole, the judgment of the Court in this case must be for the Crown.

Judgment for the King.

No. XVIII.

The Attorney-General v. *Lockley and others* (*b*).
Chan. Mich. 9 *Geo. II.*

This was an information brought to secure a charity, and the case was thus: John Radford, and Anne his wife, were seised in fee, and conveyed the premises by fine and deeds, declaring the uses thereof, to their trustees and their heirs, to the use of them and their heirs, in trust for John Radford and his wife, and the survivor of them, and the heirs of the survivor, with power for the wife, in case the husband survived her, to charge the estate with 400 *l.* The wife died first, and executed her power for charitable uses; John enjoyed the estate during his life; and by will, dated 25th Jan. 1723, he devised the premises in fee to Tuder Lockley. Now this estate was to be sold for discharging the charity and payment of mortgages made by Tuder Lockley: and the question was, whether the sale should be subject to the dower of Tuder Lockley's wife, in case she survived her husband. It was argued by *Noel* in favour of dower, and by *Verney* against it; and the following cases were cited: Preced. Canc. 241, 250; *Banks and Sutton at the Rolls*, March 1733; Preced. Canc. 336; Chan. Rep. 369; Show. 111; Preced. Canc. 65; Cro. Car. 901; *Ambrose and Ambrose*, determined in the year 1717, in the House of Lords (I).

Talbot, Lord Chancellor.—This is a considerable point, and should be settled some way or other; in the first place with regard to the wife, her demand is properly a legal one, and it has been hinted at, as if the legal estate was executed in Mr. Tuder Lockley; but there is no foundation for that, as the estate is limited to trustees and their heirs; therefore it is a legal estate absolutely executed in the trustees, for there cannot be a use limited on a use. Then the question will be, whether Tuder Lockley's

(*b*) *Vide supra*, vol. 1. p. 517, *n*.

(I) This is the case in 1 P. Wms. 321. The case was that the deceased husband bought an estate in the name of a third person. The Court considered it clear that the wife was not dowable of the trust estate. It appears by the report, that the decree was affirmed in the House of Lords. I find by the Journals of the House of Lords, that the wife prayed that the estate might be deemed part of the personal estate of her husband, or at least that she might be entitled to her dower out of it. See Journ. Dom. Proc. vol. 20, p. 456.

wife is entitled to dower of an equitable estate of inheritance vested in her husband; for at present the husband is living, and if the wife died before him, then this question never can arise. As dower is a legal demand, so clearly, with regard to a use, a wife was not dowable of it before the stat. Hen. VIII. Vernon's case, 4 Co. 1. Then how can she be dowable of a trust after that statute? For is there any solid distinction between a use before a statute and a trust after it? What was a use but a right to receive the rents and profits of lands of which the legal estate was in another? And a trust is the very same now: and if before the statute the right of the wife was considered strictly as a legal right, so that the equitable interest was not effected by it, the reason holds equally strong since the statute, that courts of equity should follow what was the rule before the statute with regard to those estates. How there came to be a difference as to estates by curtesy, I cannot tell; nor how it came to be extended to estates by curtesy, and yet not to dower, I cannot tell. I do not see, on this general question, whether a wife shall be endowed of a trust estate of inheritance, that there is one case, from the time of the stat. H. VIII. to this time, that is directly in point, except the case of Fletcher and Robinson, Preced. in Canc. 250. That case is extremely short; and the reason given for it is, whether it be a good one or no I shall not say, that the conveyance was considered as fraudulent, being done with an intent to prevent a forfeiture; and therefore, in that case, the Court seems to have disregarded it, which shows it was not determined simply on this point, but on other matters, which do not fall in with this case. The case of Banks and Sutton seems to have been determined on this, that the time of the conveyance was come, and the husband had a right to call for it; and then the Court, upon considering that as done which ought to have been done, might properly assist the wife in that case. The case of Bottomley *v.* Fairfax, Preced. in Canc. 336, before my Lord Harcourt, is an express authority that a wife is not dowable of a trust estate of inheritance; and to this it may also be added, that it is the general received opinion of every one who has attended this bar constantly, that they are not; and it is the practice to make purchases in the name of the purchaser and trustee—but to what intent or purpose? Only to prevent dower, that by there being a survivor to the purchaser, his wife might not be entitled to it. But if it should be ruled, that a wife is entitled to a dower of a trust estate of inheritance, pro-

visions of this kind would be overthrown. I mention this, because it is hinted at, as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law: but when there is a received opinion, and conformity of contracts and settlements thereon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore it ought to be done only on the clearest and plainest ground. In the present case I cannot say they are mistaken, because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of a use. There are other cases where terms for years have been carved out, and the inheritance remains in the husband, and as to those there is no difficulty. Where the term is created for particular purposes, and the inheritance remains in the husband, and descends to his heir, which term is not a bar at law of dower, but only prevents the execution of it till the term is expired, there the term may be redeemed; and that was the case of my Lady Dudley, Preced. in Canc. 241. There the express limitation of the term was to the owner of the freehold after the trust expired. As to those cases where the inheritance is sold for a valuable consideration, (Preced. in Canc. 65,) which was the case of Lady Radnor, and the purchaser took an assignment of the term, if it was without notice, there could be no difficulty; but whether that case was so or not, I do not remember. But the present case is not that of a wife entitled to dower with a *cessat executio*; for the question here is, whether the wife is dowable of an equitable estate of inheritance in fee simple? As to what is said, that this is to be considered as a contract on the part of the wife, therefore equity should supply it; the answer is, equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? No, for nothing but what the marriage implies, which is, that she shall have dower of what she is dowable by law: and then the question comes to this, whether she is dowable by law of a trust? Here she could have nothing of this in contemplation at the time of her marriage: for the equitable interest was left to her husband, long after the time of her marriage, which was in 1713; and the equitable estate was not given him till 1723. Therefore the decree must be, that the land shall be sold and enjoyed, discharged of any claim of dower.

In another manuscript note of this case, Lord Talbot is

reported to have said that trust estates, since the statute of uses, ought to be considered as uses, before the statute, of which estate a woman could not be endowed; that the case of Bottomley and Lord Fairfax was express in point; that, as this method of conveying on purpose to prevent dower, had been used for so many years, a court of equity ought not to make a decree which would overturn such a number of settlements. And the reason of the decree in the case of Banks and Sutton (which he stated) was different: for there the direction of the will was, that the legal estate should be conveyed to Sutton; and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. The other cases of dower of trust estates are, where terms are created for particular purposes, and the inheritance remains in the husband: in these cases she has a title of dower, and so she may come into this Court and redeem the term, which is the case of Lady Dudley.

No. XIX.

Bret. v. *Sawbridge and others* (c). *Before the Master of the Rolls.*

Sir John Wroth was seised in fee of the lands in dispute, and mortgaged the same for one thousand years to Francis Hill, as a security for 1,100 *l.*, which, by several mesne assignments and further charges, to the amount of 2,400 *l.* in the whole, came to Richard Watson, in trust for Sir Edward Bret; and Brewster (who assigned the same to Watson), covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret: and Sir Edward Bret, reciting by his will, that he had purchased of Brewster the residue of the said term of one thousand years, and that there was a covenant in the purchase deed from Brewster as aforesaid, but that Sir John Wroth dying before the conveyances were executed, and leaving an infant of eight years old, his heir at law, it was then impossible to have the fee conveyed: therefore Sir Edward Bret declared it to be his will, that when the heirs of Sir John Wroth should attain the age of twenty-one, a conveyance should be executed according to the settlement in tail after mentioned; and he devised the same to John Bret Fisher for life, remainder

(c) *Vide supra*, vol. 1. p. 526.

to trustees, to preserve contingent remainders; remainder to his first and every other son in tail male successively; remainder to Nathaniel Fisher for life, and in the very same manner; and so to Edward Fisher; remainder to the right heirs of Stephen Beckingham and Richard Watson (the trustees of the term), whom he made his executors; *and then he directed the remainder of the term should remain, and be attendant on the inheritance,* according to the limitations above mentioned: and all other his real and personal estate he devised to John Bret Fisher, Nathaniel and Edward Fisher. Upon the death of Sir Edward Bret, the executors proved the will; and afterwards Nathaniel and Edward Fisher died intestate, without ever having any issue; and John their brother took out administration to them. John Bret Fisher, thinking the limitations over to the right heirs of Beckingham and Watson void, took himself to be absolute owner of the term, as co-residuary legatee, and representative of the other two his brothers, in case he should ever die without having issue, and mortgaged the residue of the term for one thousand years to the defendant Sawbridge, as a security for 350 *l.* One Newland purchased the reversion, and the equity of redemption, from the right heirs of Sir John Wroth, for one hundred broad pieces; but before the purchase, he promised John Bret Fisher should have the benefit of it, if he would pay him the purchase-money, his expenses, and a small gratuity: however, John Bret Fisher, a long time after the purchase was completed, neglected to comply with the terms, and so it was sold to the defendant Sawbridge. John Bret Fisher, by his will, devised all his real and personal estate to the defendant Sawbridge, and made him his executor, and afterwards died without ever having issue.

The plaintiff filed his bill, to have the estate conveyed to him according to the will of Sir Edward Bret, all the precedent limitations being spent, and to have an account of the rents and profits, he being heir at law, and also representative of the personal estate of Richard Watson, who died in the life-time of John Bret Fisher: but Stephen Beckingham is still alive, and made a defendant in this cause.

Sir Joseph Jekyll, Master of the Rolls, after argument on both sides, and time taken to consider of it, delivered his opinion to the effect following: The plaintiff in this case does not want to have the term assigned to him, because he has the legal interest of it in him, as representative of Richard Watson, who was a

trustee of the same for Sir Edward Bret. Then the point to be determined is with regard to the account of the rents and profits. Though Brewster covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret and his heirs, yet it does not appear that Sir John Wroth was under any obligation to convey the same; for he was no party to the conveyance to Sir Edward Bret, nor did any thing to show his agreement thereto: but the covenant of Brewster to Sir Edward Bret, being before the statute of frauds, there might be a parol agreement by Sir John Wroth that he would convey, and it would be good; otherwise it would be difficult to account why Brewster should enter into such a covenant. However, Sir Edward Bret, by his will, desiring the heirs of Sir John Wroth to convey the inheritance, and directing the limitations of the same, and that the term should be attendant on it, did intend to devise the inheritance, and not the term in gross. But it is said, though the inheritance cannot pass, the term may, according to the limitations in the will of Sir Edward Bret. It is not necessary now to enter into the question how far limitations of terms are good, or whether, by such limitations as those in the present case, all the prior devisees dying without having had issue, the remainder of this term could vest in the plaintiff as to one moiety. But if I was to deliver my opinion about it, I should be under great difficulty: for on this point there is the opinion of one Lord Chancellor against another; my Lord Cowper, in the case of Higgins and Dowler, 2 Vern. 600, and Salk. 156, held such remainder of a term to be good, all the parties dying without ever having any issue: and by the present Lord Chancellor, there have been two cases determined, Clare and Clare, P. 7 G. II. Saberton and Saberton, 8 G. II. In one of them it may be taken, there was an estate tail in the first taker; but in the other it seems not to be so; but in both of them my Lord Chancellor held such limitations of estates tail, though to persons not in being, and never vesting, to be too remote, and so delivered his opinion. Higgins and Dowler, as it appears to me, was not clearly stated and urged, but was taken as it is reported in Salk. and Vern., which my Lord Chancellor said was incorrectly done in both of them: but I have a complete report of it by two gentlemen; and in the case of Stanley and Lee, M. 8 G. II., I looked into the pleadings and the Register's book; and on the whole matter I find the judgment of my Lord Cowper was, that such limitations never having been *in*

esse, and so not vesting, the limitation over might be good. There is one case I did not mention, when I gave my opinion in Stanley and Lee, and that is Massenburgh and Ashe, Chan. Rep. 275, in which the Judges were of opinion, that the limitation of a trust of term must be considered as limitations of a term at law; and that case is stronger for allowing limitations over than this, though that was on a deed, and this is on a will, which has a more favourable construction. But I must leave this point of the limitations of a term for future consideration, if ever it comes before the Court, for this case will turn on a different point(I). Here Sir Edward Bret thought he was

(I) It is very satisfactory to find that Sir Joseph Jekyll did not give up his opinion in Stanley *v.* Lee. The doctrine in the case of Stanley *v.* Lee (2 P. Wms. S. C. MS.) is now well established, and the case of Clare *v.* Clare (For. 21, S. C. MS.) is overruled by a series of authorities. See Sabbarton *v.* Sabbarton For. 55. 245. S. C. MS.; Knight *v.* Ellis, 2 Bro. C. C. 570; Phipps *v.* Lord Mulgrave, 3 Ves. jun. 516. The rule, as now settled, is accurately stated by Mr. Fearne—Whatever number of limitations there may be after the first executory devise of the whole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which could carry the whole interest, happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Exec. Dev. 4th edit. 415.

In a former edition of this work a discussion was introduced, in this place, on the question, whether the term of twenty-one years, after a life in being, could be taken as a term in gross in the case of an executory devise. This will now be found in n. (2) to the last edition of Gilbert on Uses, p. 260. The case of Beard and Westcott, there mentioned, was fully argued before the Master of the Rolls, upon the certificate being returned; and on the 17th Dec. 1811, the Master of the Rolls gave the following judgment:—"This case stood over in consequence of a suggestion, that the certificate of the Court of Common Pleas involved in it the decision of a new question, which had not undergone any particular discussion, or received any particular consideration in that Court: namely, how far the validity of a limitation over, by way of executory devise, is affected by the circumstance that the period of 21 years, after the duration of an estate for life, has not any connection whatever with the minority of any person taking an interest under the preceding limitations. Now I do understand, that the question certainly did not receive any particular consideration in the Court of Common Pleas, it being taken for granted, that the rule upon this subject stood as it is commonly laid down in the books: namely, that the executory devise falls within the allowed limits, if the event upon which it is to take place must happen within a period of 21 years after the life or lives in being. I am not aware, however, that the point has been directly decided; and Lord Alvanley's doctrine in the case of Thellusson and Woodford, is against the addition of 21

entitled to the trust of the inheritance, and did not intend to devise the term in gross, but intended to devise the inheritance, and

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years, except by way of provision for the circumstance of the devisee being under age, or in *ventre sa mere* at the expiration of the life or lives in being.—And as the question has now been raised, and as there is that degree of sanction to the doubt, it does seem to me desirable, that it should be set at rest by the decision of a court of law; so, therefore, I propose to send the case back again to the Court of Common Pleas, to call their attention to the point, that they may have an opportunity of pronouncing an explicit opinion upon it. I have received this information from some of the Judges."—The case was accordingly sent back to the Court of Common Pleas, who refused to hear it argued, until the point upon which their opinion was required was stated. Thereupon, the following question, with the approbation of the Master of the Rolls, was stated to be the question for the opinion of the Court: "How far the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance, that there may be issue of John James living at his death, to whom the estate is given by the will (but who would be incapable of taking according to the above certificate), for whose death, under twenty-one, the limitation over, in the event before mentioned, must await."—The case has since been argued before the Judges of the Court of Common Pleas, and they certified, that the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are not affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of John James Beard living at his death, to whom the estate is given by the will, but who would be incapable of taking according to the former certificate from the Judges of this Court, for whose death, under twenty-one, the limitation over, in the event before mentioned, must await. The case is now reported in 5 Taunt. p. 393. It has been argued before the Lord Chancellor, who sent the case to the Court of King's Bench. It was argued in that Court, and the Judges certified, that John James Beard, the grandson and heir at law of James Beard the testator, took, under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance, and also in the leasehold estates, if they should so long continue; and that upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. And that all the limitations, subsequent and expectant upon the limitation to the first son of John James

that it should attract the term; Whitechurch *v.* Idem. 10th Feb. G. I. A man being seised of a reversion in fee, and having the trust for a term for years to attend it, made a will of his own hand-writing, and thereby carved out several limitations of the land and premises, not unlike those now in question; but did not publish it in the presence of witnesses; and the doubt was about the limitations of the term; for the will could not pass the inheritance, being not executed according to the statute of frauds. But it was insisted, it might carry the term as the personal estate, upon which the opinion of the Court was taken. But it was determined, it should not pass, because the devisor intended to pass an inheritance, and the writing under the testator's own hand was looked on as an inchoate act to pass the inheritance, and therefore could not operate on the term. Besides, the testator in that case having prepared a writing which was intended to be executed according to the statute, there was no notice taken of any term that should be attendant on the inheritance, as there is in the present case, which makes it stronger against the plaintiff than it was in that case. That case looks like an authority that must govern the present case; for though Sir Edward Bret was not entitled to the trust of the inheritance, yet he thought Sir John Wroth was bound to convey, and on that assurance and persuasion made his will and intended to pass it as an inheritance. There are several cases where a man intended to pass something, and yet the law will not allow it; as in case of a devise, where there is an uncertainty either of the person or the thing, *à fortiori* here it should be void, *because* the testator intended to pass what he had not, for he intended to pass the inheritance when he had it not; and there is a great difference between real and personal estates, as to being assets or not, and also as to the course of succession to whom the same shall go after the death of the owner; and there is likewise a difference where a will is made as to the limitations of the one and of the other; therefore when the testator in-

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Beard, are void; 5 Barn. & Ald. 801; and that certificate has been confirmed by the Lord Chancellor, 1 Turn. p. 25. The point has again been agitated in the case of Bengough *v.* Edridge, which now stands for judgment, and will be carried to the House of Lords. In that House it has been decided that the limit is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatsoever; but that is the limit, and the period of gestation is to be allowed in those cases only in which the gestation exists. Bengough *v.* Edridge, 1 Sim. 173. Cadell *v.* Palmer, 10 Bing. 140.

tended to pass an inheritance and had it not, there is no reason to suppose he designed to pass a term in gross; for he says the term shall be attendant on the inheritance according to the limitations mentioned in the will; and so, as to passing the term, the testator had not *animum testandi:* therefore I conceive the bill must be dismissed.

No. XX.

Forshall v. *Cole and Short* (*d*), *Ch.* 27*th Nov.* 1733.
The Master of the Rolls sitting for the Chancellor.

Bill was brought to have a bond delivered up, and proceedings at law upon it to be stayed. The bond was entered into on this occasion: one Durant, in 1728, made a mortgage to plaintiff, but, before this, had given a bond to Cole for 200*l.* Cole, in 1725, obtained judgment upon his bond, and afterwards, since the date of the mortgage, took out an *elegit,* and extended the mortgaged premises towards satisfaction of his judgment; upon this, plaintiff, to save expense and discharge the lands, gave Cole a bond for the 200*l.* and interest; but it was agreed between them, that the bond should be deposited in Short's hands, and only to be made use of if Cole's judgment was entered so as to affect the lands precedent to plaintiff's mortgage. The judgment was signed in 1725, but not docketed, *secundum* stat. 4 & 5 W. & M. c. 20, till 28th January 1730.

Upon reading the statute, the *Master of the Rolls* was of opinion that judgments cannot be docketed after the time mentioned in the act, viz. the last day of the subsequent term in which they are entered, and that the practice of the clerks docketing them after that time is only an abuse for the sake of their fees, and ineffectual to the party; and he said he would speak to the Judges about it.

Solicitor-General.—It is proved in the cause, that the mortgagee had notice of the judgment at the time of the mortgage.

Master of the Rolls.—Notice is not material, the statute not making a difference between a mortgagee with notice or without; and besides, the notice which the act requires is the docketing, which by the act is become a constructive notice; and therefore he decreed the bond to be delivered up and cancelled, and that the plaintiff should have his costs both at law and in

(*d*) *Vide supra,* vol. i. p. 552.

this Court, and that the 10*l.* which plaintiff had paid upon the bond, should be returned, which he said the attorney concerned in entering the judgment ought to pay out of his own pocket; and that he believed an action on the case would lie against him, for he believed it was owing to his negligence that the judgment was not rightly entered: and the defendant Short having delivered up the bond to Cole, and permitted him to proceed at law upon it, contrary to his trust, he decreed costs as against him likewise.

No. XXI.

Burton and others v. *Todd.*
Todd v. *Gee and others* (*e*).

31*st March* 1818. *Judgment by Sir Thomas Plumer, Master of the Rolls.*

These two causes are now to be disposed of. The first cause was instituted in May 1804, by Messrs. Gee and Osborne, and Mrs. Burton, the trustees under the will of Mr. Burton, against Mr. Todd, for a specific performance of an agreement to purchase an estate; which agreement was entered into in August 1802.

In June 1806, the common order for a reference to the Master, whether a good title could be made to the estate, was obtained by the plaintiffs in this suit.

In Dec. 1807, the Master made his report that a good title could not be made. To this report the plaintiffs took an exception, which was overruled in May 1809; no further proceedings have been taken in this suit.

In October 1808, Mr. Todd instituted a suit against Messrs. Gee and Osborne, the trustees, and against the persons interested in taking the accounts under the will of Mr. Burton, to have the necessary accounts taken, and for a specific performance of the agreement, and for a compensation as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe-free, or subject to a very trifling modus.

In December 1813, a decree was made in this cause, whereby it was referred to Mr. Steele to take the necessary accounts and inquiries, in order to ascertain whether a good title could be

(*e*) *Vide supra*, vol. ii. p. 10.

made to the estate in question; and to state whether a good title could be made thereto.

In December 1816, the Master made his report; stating, that a good title could be made to the estate in question, except as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe-free, or subject only to a very trifling modus, and which the Master reported not tithe-free, or subject to a very trifling modus.

The decree, therefore, in the second suit is nearly of course. The plaintiff, Mr. Todd, is entitled to a specific performance, and to a compensation for the tithes of the two hundred and twenty-seven acres. The only questions are, 1st. As to the principle on which the account must be taken: and 2dly, As to the costs.

By the agreement in August 1802, it was stipulated that the purchase-money should be paid by instalments, one-third on the 10th October 1802; one-third on the 5th January 1803; and the remaining one-third on the 5th April 1803, on a good title to the estate being then made.

The purchaser paid the first instalment, amounting to 5,333 *l.* 6*s.* 8*d.* on the 10th October 1802, and the vendors have ever since had the same in their possession, and have also received all the rents and profits of the premises; the plaintiff, Mr. Todd, never having been let into possession of any part of the premises. An abstract was delivered in April 1803, and was returned by Mr. Todd, with the objections of counsel, before May 1803; and the principal objection taken to the title was, that the title could not be approved unless the necessary accounts were taken in a court of equity. The vendors insisted that the purchaser was not entitled to have the accounts taken; and instituted their suit in May 1804, to compel the purchaser to take the estate without having the accounts taken; they failed in that attempt, and Mr. Todd having subsequently instituted the second suit for the purpose of having the accounts taken, was resisted by the vendors, but succeeded.

The vendors then having been uniformly wrong, and the purchaser uniformly right, and the vendors having been in possession of one-third of the purchase-money, and in the receipt of all the rents and profits of the estate for upwards of fifteen years; the question is, upon what principle are the accounts to be taken? The usual rule is, that the purchaser is to have the rents, and to pay 4 *l. per cent.* for his purchase-money. This rule

is rather hard where the delay is not caused by the purchaser. The rents seldom yield 4*l. per cent.*; and the purchaser having been kept out of the enjoyment of the estate, receives it at last in a worse condition. In the present case, fifteen and a half years' delay has been caused by the resistance of the vendors; during that time they have had the enjoyment of nearly 6,000*l.* of the purchase-money (which in that period would be doubled); and have also received all the rents: to decree the usual accounts, would be to give the party who is wrong, all the advantage of the delay occasioned by himself: it would be to reward the party who has done wrong, and to give him a double benefit, and to work injustice to the party who has been uniformly correct. The cause is novel, there is no precedent. It may be said, that Mr. Todd might have applied to have the 5,333*l.* 6*s.* 8*d.* or the rents and profits, brought into Court and laid out, but he has not done so, and the vendors have reaped the benefit of his not doing so.—Under these circumstances, the vendors must account, not only for the rents and profits of the estate from October 1802, but also for interest, after the rate of 4*l. per cent.* upon one-third of the rents and profits.

As to the costs. The original bill must be dismissed with costs, because the vendors, apprised of the objection, instituted an improper suit. As to the second suit. The vendors took no steps to amend the original bill, and to frame it properly to obviate the objection to the title. Mr. Todd had therefore no means of obtaining a specific performance of the agreement, but by the institution of the second suit; the vendors resisted and failed; Mr. Todd succeeded, and a specific performance was decreed. There was no inconsistency on the part of Mr. Todd. The will of Mr. Burton rendered it necessary that the accounts should be taken. All the parties to the second suit were interested in the accounts. The vendors must be at the expense of clearing the title, by taking the accounts; and, therefore, Mr. Todd is entitled also to the costs of the second suit.

No. XXII. (*f*)

Duke of Bedford v. *Trustees of the British Museum.*

Mr. Shadwell thus stated the case to the Lord Chancellor.—The nature of the case is this; I can state it very shortly: Lady Rachael Vaughan, prior to her marriage with Lord William

(*f*) *Vide supra*, vol. ii. p. 81.

Russell, was seised in fee of the land on which the Museum now stands, which was parcel of another portion of land called Longfield and Babersfield; and she made a conveyance, by which she vested the legal estate of the whole of those lands in trustees, and also the legal estate of Southampton House, which was her own inheritance, in trust for her. She then married Lord William Russell, and by a deed dated 1675, to which she was a party as well as Lord William Russell and the trustees of the legal estate were parties, she and Lord William Russell and the trustees together were empowered by the deed to grant and convey the ground on which the Museum stood. By that conveyance to Ralph Montagu, Ralph Montagu covenanted, among other things in a general way, that he would not erect buildings on the ground which was conveyed to him, to the northward of the line of Southampton House. The covenant he made was a covenant not with the trustees in whom the legal estate was, but it was with Lady Rachael Vaughan and her heirs and assigns. That is the general nature of the case. After that Lord William Russell died, and the legal estate in the remainder of the land which had not been conveyed to Ralph Montagu, was re-conveyed by Lady Rachael Vaughan, and then by assignments and descents the legal estate of the land in the adjacent land, the Museum garden, has descended and become vested in the present Duke of Bedford. By the deed, which was a conveyance to Ralph Montagu, a rent was reserved of 5*l.* annually, which has been paid by the present Duke of Bedford; and besides that, there was also a reservation of a rent of 3*l.* per day, in case any buildings should be erected in contravention of the covenant; and that rental of 3*l.* a day is secured by a power of entry and distress.

The question now arises whether, inasmuch as Southampton House has been pulled down and demolished, but on the site of it and on the land adjacent to the Museum gardens, houses have been built by the Duke of Bedford and his tenants, whether or not he has a right in equity to restrain the trustees of the British Museum from making buildings in the Museum gardens, contrary to the letter of the covenant which was made by Ralph Montagu with Lady Rachael Vaughan? That is the general nature of the case. When the case was heard before the Vice Chancellor, this difficulty occurred in his Honor's mind: he thought that the covenant was not a covenant which ran along with the land; that is, that inasmuch as the rent of

5 *l.*, which was the annual rent, was only reserved out of the land granted to Ralph Montagu; and inasmuch as the rent of 3*l.* per day in the event of buildings being made, was only reserved out of the land granted to Ralph Montagu, that it could not be said that the covenant not to build on the land granted to Ralph Montagu, was a covenant that ran with the land which was not granted to Ralph Montagu; and therefore his Honor thought, that inasmuch as the covenant could not at all be said to run with the land, so that no action at law could be sustainable. He thought that a court of equity could not interfere to give the parties a more beneficial remedy and a more beneficial right than had been reserved to themselves by the form of the conveyance.

The Vice Chancellor gave the following judgment:—This is an application to me on the part of the Duke of Bedford to grant an injunction to restrain the trustees of the British Museum from building on the land which they hold in that character to the northward of the ancient line of Southampton House; and the foundation of the application rests upon the grant which was made by the trustees of Lady Rachael Russell, and by her appointment to Mr. Ralph Montagu, who originally built Montagu House; and it is then said, that Ralph Montagu is to be taken to have covenanted with Lady Rachael Russell, her heirs and assigns, that he never would build to the northward of that particular line. Then that the trustees are about to infringe that covenant, and that this Court will interfere to restrain that infringement. The policy of the law of England does not allow that the owner of land, when he thinks fit to part with it, is to impose any captious restraint upon the lawful enjoyment of the land; and those who seek to enforce a covenant which affects to restrain a particular lawful use and enjoyment of land, must, according to the acknowledged principle of the law of England, show that they have some interest in that restraint, and that it is not for a captious or arbitrary purpose. The covenant is in terms made with Lady Rachael Russell and her heirs and assigns simply. In terms, therefore, it is a mere personal covenant. It is a covenant with Lady Rachael Russell and those who in all times after her should become entitled to receive the rent of 5 *l.* a-year, which is one of the conditions of the grant in fee: and looking at the covenant according to those terms, the question would be, is the interest of the Duke of Bedford, as the heir or assign of Lady Rachael Russell in that 5 *l.* a year, to be materially affected by the erection of these intended build-

ings to the northward of the line of Southampton House? The question is, if the Duke of Bedford, as the heir or assign, was treating simply in that character, could he establish in a court of justice that his interest in this perpetual rent of 5*l.* a year will be injured by the buildings now sought to be erected, because if he is entitled to an action at law for damages, he is necessarily entitled to the injunction of this Court to restrain that breach of covenant? It is not, however, contended in argument, that it is possible for the Duke of Bedford and for his counsel here to represent that his interest in this 5*l.* a year will be in any manner lessened by the buildings now sought to be erected, but on the contrary, it is perfectly plain that the erection of additional buildings would give an additional security, as it would give more value to the land, and of course not diminish the legal interest of the Duke of Bedford in that rent, and if it rested there, it certainly would not be contended here that it would be possible to call for the interference of this Court by way of injunction.

It is, however, said, that according to the true effect of this instrument, it is plain that the agreement of these parties with respect to these covenants was made not for the purpose of affording additional security for the rent of 5*l.* a year, but for the purpose of preventing such a use of this land, as should tend to diminish either the valuable or pleasurable enjoyment of the land adjoining—the valuable and pleasurable enjoyment of the land upon which Southampton House was built, and that the law will permit those restraints; so that I who am possessed of a particular property of which I have the personal enjoyment, that I have a right so to deal with land which belonged to me, and which is contiguous to mine; that I have a right so to deal with it, if I think fit to alienate it, as to restrain any use which may tend either to diminish the pleasure or the profit of the land which I retain.

The question, therefore, is, whether upon the whole of this deed it does appear that these covenants have been so framed as to afford evidence of an agreement that Mr. Ralph Montagu entered into with Lady Rachael Russell and those who represent her, as being the owners of Southampton House and the land adjoining, that he would never use this land but in the manner prescribed, either to the prejudice of the profit or pleasure of Southampton House? If this deed does afford evidence of such an intention to the parties to the instrument, there is a

clear remedy at law against the act which is now sought to be enforced, and, as I before observed, a clear remedy in a court of equity by way of injunction to restrain the commission of that act.

The consideration, therefore, is, as I first suggested to the bar, as to what would ultimately appear to be the real question between the parties, whether this deed does or does not afford evidence of an agreement not between Lady Rachael Russell and Mr. Montagu personally, but between Mr. Montagu and those who claim under him the subject of the grant, and between Lady Rachael Russell and those who claim under her Southampton House and the site of that house. It did appear to me the first moment the case was opened, that such ultimately must be the question in this case. It has been argued with all the ability and ingenuity which the bar could afford—after all the research that the authority of the Court could afford, but I confess the principle remains untouched in my mind. If this deed does afford evidence at law that such was the agreement of these parties, then this Court will follow the law, and will act upon the same agreement, and will interfere to prevent the commission of the act. But if a court of law declares that this deed affords no evidence of such an agreement, I cannot admit the principle that a court of equity can read this instrument to have a different effect than a court of law. A court of equity cannot say, that although a court of law has declared that the instrument affords no evidence of an agreement, that it will, upon the facts stated, collect that the intention of the parties was to that effect, or act upon the facts thus specified. My opinion is, that a court of equity, in the construction of an agreement, must follow the law; and if at law the construction is the same as in equity, its powers will be given for a different purpose, namely, for the purpose of restraining injury, and not of giving damages. I must, therefore, according to my view of the case, send the question to a court of law to determine what the intention of the parties really was; but I will relieve the parties from any disability or obstruction they may receive in a court of law in respect of the form of this covenant; and whatever the parties may feel will facilitate the real decision of the question at law, I will take care to afford them. I will take care that they shall have every facility to enable a court of law to decide the actual question that is meant to be submitted.

Lord Eldon ultimately decided, that under the circumstances, the acts of the parties, the alteration of the property, &c. the right to relief in equity was at an end.

No. XXIII.

Rea v. *Williams*, (*Exch.* (*g*).

The plaintiff Rea and one Pritchard purchased jointly a lease made by the Duke of Beaufort for the life of another person, and they jointly took the profits of it for some time; but afterwards they conveyed the estate to the defendant Williams, in consideration of 300*l.*, as was expressed in the conveyance, though no part of the money was ever paid, and Williams acknowledged by his answer, that he was a mere trustee for the parties; but no declaration of trust was ever executed, nor did it any way appear with what view the estate was vested in the defendant, any further than it was believed it was done to screen it from execution, they being both of them much indebted. Afterwards Pritchard died intestate, and the defendant Williams took out administration to him, but there was not assets enough to pay all his debts. This cause came on to a hearing on the bill and answer, and the question was, whether the trusts of the estate belonged to Rea the survivor, as the whole estate indisputably would, if the legal estate had continued in the two purchasers? To prove the trust would survive, were cited 1 Vern. 217; Eq. Cas. Abr. 291; 2 Vern. 556, 683.

Mr. *Wilbraham*, to show this trust did not survive, took a distinction between 2 Vern. 556, and the present case; for there, he said, was an express limitation of the trust to the two daughters, so they might take jointly; but this is a resulting trust only, and no express limitation; and equity, which discourages joint tenancies, may construe that to be a tenancy in common; Salk. 158. If a joint tenant for years mortgages his part of the term, this is a severance of the joint tenancy, 2 Vern. 683.

Reynolds, Chief Baron.—I think the joint tenancy of the trust in this case was not severed: every one who has an estate has two rights in him, a legal estate and an equitable interest; nothing passed by the conveyance to the defendant but the legal estate, and the equitable interest resided in the two purchasers,

(*g*) *Vide supra*, vol. ii. p. 127. 129.

and remained as it originally was, the consequence of which is, that it must go to the plaintiff by survivorship. Carter, Thompson and Fortescue were of the same opinion; and Fortescue said, he saw no difference between an express and an implied trust.

No. XXIV.

Lechmere v. *Lechmere* (*h*), *Ch. E. T. Geo. II.*

This case was elaborately argued upon the appeal. The argument lasted four days. Upon the first question Lord Talbot delivered his opinion at considerable length. Upon the second question he pronounced the following judgment:

The second question is as to the satisfaction, whether what descended to the heir at law is to be considered as a satisfaction of what he is entitled to under this covenant. As to questions of satisfactions where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere *I do not consider him as a creditor, but as standing in the place of his ancestor,* and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain, for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchases made after the articles, for as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple, in possession, &c.) though considered as a satisfaction to a creditor, yet they do not answer, because they are

(*h*) *Vide supra*, vol. ii. p. 151, 152, 153.

not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple, in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed so soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000*l.* in lands, and he lays out part as he can find purchases which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance, and that seems to me rather his intention than to enlarge his real estate. The case of Wilcox and Idem, 2 Vern. 558, though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200*l. per annum* was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass,

and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the Master of the Rolls.* There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part of satisfaction of the 30,000*l.* to be laid out in land under the articles, and the residue of the 30,000*l.* must be made good out of the personal estate.

No. XXV.

Abstract of the Special Verdict, in Fairfield v. *Birch* (*i*).

Edmond Kelly, being seised in fee in 1747, made a settlement before his intended marriage, in consideration of the wife's portion, as to part to trustees in fee, in trust to sell and pay off incumbrances which amounted to 4,000*l.* As to the residue, to himself for life, remainder to trustees in the usual way, to preserve remainders; remainder to the use, that the wife might receive a jointure rent-charge, in bar of dower; subject thereto, to the first and other sons of the marriage successively in tail-male; remainder to the first and other sons of Edmond Kelly, by any other wife, successively in tail-male; remainder to two brothers of the settler and their issue male in strict settlement; remainder to Ignatius Kelly, the uncle of the settler for life; remainder (after a limitation to trustees to preserve) to his first and other sons successively in tail-male, with the reversion to the settler's right heirs. Power to the settler if he survived his wife, having issue by her a son, to jointure any after-taken wife, to the extent of 50*l.* a year; and if no issue male, of 100*l.* a year; and if no issue, 150*l.* a year, and 2,000*l.* for younger children's portions. Covenants for title and further assurance. Power to the settler to charge 500*l.* but not to affect the jointure. Proviso, that if the settler and his brother should die without issue, the estates should stand charged with 2,000*l.* for the sisters of the settler, or their issue.

The lands vested in the trustees in fee, were sold to Robert Birch, under a decree for the payment of the incumbrances, which were accordingly paid out of the purchase-money.

(*i*) *Vide supra*, vol. ii. p. 165.

Robert Birch had notice of the settlement of 1747, in the year 1755.

Ann Kelly died in the lifetime of Edmond, previous to the 2d May 1758, without having had issue.

Edmond, on the 2d of May 1758, on his marriage with Harriet Hincks, in consideration of a portion of 2,500 *l.*, settled the estates to himself for life, remainder to trustees to preserve, remainder to the intent that the intended wife might receive a jointure rent-charge of 300 *l.* per annum, if there should be issue, and subject thereto, to the first and other sons of the marriage successively in tail-male; remainder to Edmond the settler in fee.

15th July 1761, Edmond, for a valuable consideration, conveyed to Robert Birch the settled estates in fee. Part of the consideration the jury found to be the debts for which the estates under the decree had been sold.

The brothers of Edmond died in his lifetime unmarried, and without issue.

The lessor of the plaintiff was the grandson of Ignatius, the *uncle.*

Edmond, the settler, died in 1768, without ever having had issue.

The lessor of the plaintiff claimed under her father, Robert Birch's will, and was entitled to a portion under a term of years, created by his marriage settlement, which was made in consideration of his intended wife's portion.

No. XXVI.

Sloane v. *Cadogan.*

Rolls, December 1808 (*k*).

Under a settlement made previously to the marriage of Earl Cadogan and Frances, his wife, the sum of 20,000 *l.* was assigned to trustees upon certain trusts, under which, William Bromley Cadogan, one of the children of the marriage, became entitled, subject to his father Lord Cadogan's life interest therein, to one fourth share of the 20,000 *l.*, which sum was afterwards invested in the 3 per cent. reduced annuities, in the trustees

(*k*) *Vide supra*, vol. ii. p. 168.

names. By an indenture, bearing date the 26th May 1788, William Bromley Cadogan assigned to William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, all such part, share or proportion, as he the said William Bromley Cadogan was entitled to as aforesaid, expectant on the decease of the Earl, his father, of and in the said sum of 20,000*l.*, and all the interest which after the decease of the Earl should become due in respect of such share, To hold the same immediately after the death of the said Earl, and subject to his life estate or interest therein, in the mean time, unto the said William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, upon trust, immediately after the decease of Lord Cadogan, by and out of the first monies which should be received by, or come to their hands, by virtue of the same indenture, to pay 1,000*l.* to such person or persons, and for such uses, intents and purposes, as he the said William Bromley Cadogan should, by any writing or writings under his hand, direct or appoint; and, in default of such direction or appointment, then to pay the said sum of 1,000*l.* unto the said William Bromley Cadogan, or his assigns, to and for his and their own use and benefit. And upon trust, to place out or invest the residue or surplus of the said monies and premises, as soon as might be, after the same should be received by them the said trustees, in such stocks, funds, or securities as therein mentioned; and to stand possessed of all the said residue of the said trust monies which should remain after payment of the said sum of 1,000*l.* and of the said stocks, funds or securities; upon trust to pay unto or authorize the said William Bromley Cadogan and his assigns, to receive the interest, dividends, and annual produce, for life; and after his decease, and in case his wife, the plaintiff, should be then living, upon trust to pay unto or authorize her and her assigns to receive the interest, dividends, and annual produce thereof for her life, for her and their own use and benefit, the same to be in lieu of dower; and immediately after the decease of the survivor of the said William Bromley Cadogan and plaintiff, upon trust to pay, assign and transfer the said residuum, and the stocks, funds, or securities for the same, in such manner for the benefit of the issue of the marriage between them the said William Bromley Cadogan and plaintiff as therein mentioned; and "for default of such issue,

upon trust to pay, assign and transfer the same to such person or persons, and upon such trusts, for such uses, intents and purposes, and by, with, under and subject to such powers, provisos, charges, conditions, and limitations over, as he the said William Bromley Cadogan, at any time or times during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of, or purporting to be his last will and testament, to be by him signed and published, in the presence of, and attested by such and the like number of witnesses, should direct, limit or appoint; and in default of such direction or appointment, or in case of any such, and the same should not be a complete disposition thereof, then upon trust to pay, assign and transfer the said residue, and the stocks, funds or securities for the same, or so much thereof whereto any such direction or appointment as aforesaid should not extend, to the said Earl Cadogan (his father), his executors, administrators and assigns, to and for his and their own use and benefit. And, in the same indenture is contained a proviso empowering the said William Bromley Cadogan and his wife, the plaintiff, at any time during their joint lives, to revoke the said trusts, or any of them, and to appoint or limit new or other trusts in the manner therein mentioned. The 3 per cents. were sold, and the produce lent to the Earl in 1786, upon real security, by way of mortgage.

William Bromley Cadogan, on the 11th May 1789, made his will, which was signed and published by him in the presence of and attested by two credible witnesses, and thereby directed his executrix to sell a leasehold estate at Reading; "and as to the money arising from the sale thereof, I give the same to my executrix; and as to all the rest and residue of my estate and effects whatsoever, I give and bequeath the same to my dear wife Jane Cadogan." And he appointed her his sole executrix. And the said testator shortly afterwards made a codicil to his will, which was not attested, in the words following: Whereas, by marriage settlement, I have given to my dear wife Jane Cadogan for her life, the whole interest of the moiety of my mother's fortune which was settled upon me, as will appear by the settlement itself, reserving to myself 1,000*l.* for my own private use. And whereas I borrowed at Midsummer 1789, of Mr.

William May, of Bingfield Mill, the sum of 600*l.* at 4½ per cent. interest, and gave as security for the same the joint bond of myself, the Rev. Mr. Bulkley, and Mr. William Simmonds Higgs, of Pangbourn-lane, Reading; I hereby direct, that the above-mentioned 1,000*l.* be appropriated to the discharge and payment of the said bond; and if it should be convenient to my dear and honoured father, the Right honourable Lord Cadogan, to pay the said sum of 600*l.* to the aforesaid Mr. May, of Bingfield, and to take to himself the 4½ per cent. interest, and deduct the whole principal and interest out of the moiety of my mother's fortune, which comes to me and my heirs at his decease, I shall esteem it a great favour added to the many I have received from him before. And the testator afterwards made a codicil to his will, also not attested, in the words following: In November 1790, Lord Cadogan was so kind as to pay the above-mentioned 600*l.* for me to Mr. May, of Bingfield, by the which fatherly act of goodness, added to many others of the same kind, I am freed from all debts and incumbrances whatever, excepting an annuity of 10*l.* a year, which I am engaged to pay to Mrs. Warsand, Mrs. Cadogan's aunt, now living at Paradise-row, Chelsea, for her life; and also to pay the expenses of her funeral.

There was no child of the marriage between the testator and his wife. The testator did not, in his lifetime, in any manner, execute his general power of appointment in the indenture of 26th May 1783, or his power of appointment of the said sum of 1,000*l.* unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed to be entitled to one fourth part of the 20,000*l.*, and the bill was filed against the executors of the Earl of Cadogan, to establish her right.

The defendants, in their answer, stated, that the Earl paid off the 600*l.* and interest, mentioned in the codicils, and they submitted, that they became entitled to be repaid such sum out of the 1,000*l.*; and they claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to the plaintiff's right to the interest for her life (save and except the aforesaid 1,000*l.* part thereof,) under the indenture of 26th of May 1783.

Mr. Richards, Mr. Stephen, Mr. Bowdler, and Mr. Sugden, for the plaintiff. The argument of the latter, which in a great

measure was a repetition of the arguments before urged, is the only one of which he is enabled to give the reader a full note.

It was to the following effect :—

The first question is as to the 600 *l.* The defendants might as well contend that they are entitled to an account of every sum advanced by the Earl to his son. In every case, between a father and child, a provision by the father is deemed an advancement for the child, on account of the connection of blood. If a father purchase in the name of a child, *primâ facie,* it is an advancement for the child, and the evidence to rebut this lies on the father; whereas, if a purchase be made in the name of a stranger, the presumption is otherwise, and the evidence to rebut it lies on the stranger. Besides, if the question here was between strangers, payment might be pleaded although twenty years have not yet elapsed. Lord Mansfield laid it down that sixteen, eighteen or nineteen years were sufficient whereupon to found the presumption of payment (Mayor of Hull *v.* Horner, Cowp. 109; Oswald *v.* Leigh, 1 T. Rep. 270), and Lord Erskine so considered the rule (Hillary *v.* Waller, 12 Ves. 266). And even if payment would not be presumed, yet a jury would, in this case, be directed to find a release. (Washington *v.* Brymer, App. to Peake's Evid.)—[This point was given up by the defendants.]

The principal question, however, is, whether the power is executed; and first, whether it is executed by the will alone? I must admit, that in general a sweeping disposition, however unlimited in terms, will not include property over which the testator has merely a power, unless an intention to execute the power can be inferred from the will. But great Judges have disapproved of this rule. Lord Alvanley, in Langham *v.* Nenny, 3 Ves. jun. 467, wished that the rule had been otherwise, and that it had been held that a general disposition would operate as an execution of the power; and in Hannock *v.* Horton, 7 Ves. jun. 391, Lord Eldon said, that he was not sure that the rule, as now established, did not defeat the intention nine times out of ten. In favour of the rule it has been said, that to overturn it would be to destroy the distinction between power and property. That I deny. The marked and only material distinction between power and property is, that in the case of absolute property, although the party make no disposition of it, yet it will descend to his representatives; whereas a person must actually execute

his power, or the fund will go over to the person to whom it is given in default of appointment. But why should not the same words operate as an execution of the power which would pass the absolute interest? Where is the distinction as to the purposes of disposition between a general power like this and the absolute interest? If the solemnities required by the power are adhered to, it would startle a man of common sense not versed in legal subtleties to understand so refined a distinction. As therefore the rule stands upon no principle, and has been regretted by great Judges, the Court will be anxious to distinguish cases, and not to consider every case as within this general rule. Now there is not a single case in the books which governs the present. Ours is a peculiarly strong case. The gift to the Earl in default of appointment was without consideration, and the parties had a power of revocation. The persons who prepared the settlement did not understand the distinction between power and property. They gave the 1,000*l.* to such persons as Mr. C. should appoint, and in default of appointment to him and his assigns. There the power was merely nugatory: it was not larger than the gift, nor differed from it in effect. Besides, here the property moved from Mr. Cadogan; the settlement as to the Earl was merely voluntary, and the power was part of Mr. Cadogan's old dominion, and consequently the execution of it must receive a favourable interpretation. In this respect all the cases are distinguishable. Moulton *v.* Hutchinson, 1 Atk. 558; Andrews *v.* Emmott, 2 Bro. C. C. 297; Buckland *v.* Barton, 2 H. Blackstone, 130; Croft *v.* Slee, 4 Ves. jun. 60; Nannock *v.* Horton, 7 Ves. 391; and Bradley *v.* Westcott, 13 Ves. 445, are all cases where the power was given by one person to another, and cannot be compared to our case, where the power was reserved by the party over his own property. There are two cases, I must admit, where nearly the same circumstances did occur. *Ex parte* Caswall, 1 Atk. 559; Bennet *v.* Aburrow, 8 Ves. 609. But the first case came on merely upon a petition; and Lord Hardwicke said he would not say what his opinion would be if it came on upon bill and answer. Besides, Lord Hardwicke overruled this case by a later determination, as I shall presently show. In the last case the property in default of appointment was given to the next of kin, which may be thought to distinguish it from ours. But if there is no authority against the plaintiff, there are two very considerable cases in her favour. The first is Mad-

dison *v.* Andrews, 1 Ves. 57. There a man made a settlement, reserving to himself power to charge, limit, or appoint the estate with any sum not exceeding 1,000*l.* By his will, without making the slightest reference to his power, he gave some legacies, and then charged all his estate with the payment of his debts and legacies. Lord Hardwicke held that the power was part of the old ownership; and that it was but a shadow of difference that he had charged all his estate; whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property. Now this is precisely our case, and to decree against the plaintiff your Honour must overrule Lord Hardwicke's decision. The other case is Standen *v.* Standen, which has been already so justly relied on. It is impossible to read that case without seeing that Lord Rosslyn would have decided it on the ground of the power being equivalent to the ownership, even if the circumstance had not occurred to which the decision is generally referred—that the testatrix had no real estate except what was subject to the power. And yet in that case the power was a gift by a will from a husband to his wife, and was not, as in our case, a part of the donee's old dominion.

But if the will of itself is not an execution of the power, that and the codicil taken together certainly are. The operation of a codicil even in respect of real estate is to republish the will, and pass after-purchased estates, although not noticed, if executed according to the statute of frauds. Piggott *v.* Waller, 7 Ves. jun. 98. And where, as in our case, new matter is introduced, it forms an integral part of the will, in the same manner as if it had actually been inserted in the will at the time of its execution. And on this ground a codicil may explain a doubtful expression in the will, or may give an estate by *implication*, where the testator refers to what he supposes he has done by his will, although the disposition in the will is not what he states it to be. Hayes *v.* Foorde, 2 Blackst. 698; Beable *v.* Dodd, 1 T. Rep. 193. In our case the words in the will are sufficient, if an intention appeared to execute the power, and as such an intention does appear by the codicil which forms part of the will, they both together amount to an execution of the power. It is impossible to misunderstand the words in the codicil, "which comes to me and my heirs at his decease." They admit of but three constructions:—1st. He considered the fund as having

passed to his devisee, who was his *hæres factus:* or 2d, he adverted to its going to his *hæres natus,* or child under the settlement: or 3d, he looked to the event of its going to his father, the Earl, in default of appointment. The 2d cannot be the right construction; for if there was issue to take the fund, their right would prevail over the testator's, and the Earl could not retain his debt out of a fund which would in that event belong to them. The last construction is absurd: it would amount to a request, as has been already shown, to a man to pay himself a debt out of his own money.—But he considered the property as having passed to his wife; and as he knew that it was in the hands of his father, who had a life-interest in it, he requested him to retain the money out of it, and not to let his wife be troubled for it till the property given to her fell into possession. This then clearly establishes the first construction. Our case must not be compared to Holmes *v.* Coghill, 7 Ves. 429, 12 Ves. 206; for there the power executed by the will was discharged before the execution of the codicil.

It will, however, I suppose, be objected, that the codicil is not attested, and consequently cannot be deemed an execution of the power. But it is sufficient where a power is executed by several instruments, that the principal one is duly executed. Earl of Leicester's case, 1 Ventr. 278. The will and codicil amount together to an execution of the power. But I need not insist upon this, because the plaintiff being a wife is entitled to have the defect in the execution supplied; and it is not material that she is in part provided for, because the husband is the judge of the quantum of provision; nor is it material that the provision was made *after* marriage, although to constitute a good settlement of realty, as against a purchaser, a settlement after marriage is merely voluntary. Fothergill *v.* Fothergill, 2 Freem. 256; Hervey *v.* Hervey, 1 Atk. 561; Churchman *v.* Harvey, Ambl. 335.

But strong as these grounds are, they are not the only ones upon which the plaintiff's case may be rested. I mean to contend, that the supposed settlement of Mr. Cadogan was merely tantamount to articles, that the gift to the Earl was voluntary, and consequently cannot be enforced by this Court, and that it is immaterial that the funds are now actually vested in the executors of the Earl. I may admit, that if we asked the Court to execute the articles they must be executed *in toto.* But we

do not require the aid of the settlement to support our title; we are content to take this fund as part of Mr. Cadogan's property discharged from this settlement. To constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and *cestui que trust* should be established. Here Mr. C. did all he could; but that is not enough. He could not make an actual transfer. The trustees in whom it was vested would not have been authorized in transferring it of their own authority to the trustees of Mr. C.'s settlement. *If a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding?* Certainly not. As the settlement therefore was not completely perfected, the Earl could not enforce it. It will not be pretended that there is any consideration as between a child and father, which will call for the interference of this Court. The father is as a mere stranger. It was so as to covenants to stand seised; and this Court does not even advert to every consideration which is sufficient to raise a use under a covenant to stand seised. In Stevens *v.* Trueman, 1 Ves. 73, where an agreement by a child, to settle an estate in the events which had happened on her father, was enforced, it was not even hinted that there was any consideration as between the child and father; but the decision was grounded on the gift by the father of 500*l.* to the child. And in all the cases on this subject, it will be found that the decisions proceeded on the ground of some consideration given for the settlement on the strangers. Goring *v.* Nash, 3 Atk. 186, was the mere case of a settlement by a father on his younger daughter. Osgood *v.* Strode, 2 P. Wms. 245, was an actual purchase by the grandfather of the limitations to his grand-children. Vernon and Vernon, in the same book, 594, turned upon something like a moral consideration. Lord Chancellor King did not consider it a voluntary conveyance, 2 Kel. Cha. Ca. 10. Besides, there the Court relied upon the covenant which might be enforced at law; and, therefore, to prevent circuity, they enforced a performance *in specie*. But even that doctrine is now overruled; Hale's case, Ch. 1764; and in our case there is no covenant. The general doctrine in these cases is recognized in Colman *v.* Sarrel, 1 Ves. jun. 50; followed by Ellison *v.* Ellison, 6 Ves. jun. 656. In this case, it is not material that the fund is actually vested in

the defendants; because it is vested in them in a different right. —This Court will never permit a mortgagor under a settlement to claim the fund in a different character. In Ellison *v.* Ellison, Lord Eldon considered, that when the relation of trustee and *cestui que trust* was actually raised, although the settlement was voluntary, it was not material that the fund had, by the effect of accident, got back to the settler, as if the trustee of stock should make the settler his executor. Now, the converse of this proposition must equally hold good, and that is our case.—It is like a late case before your Honor, where a legacy was given to a married woman by a will, and the husband was made executor, and received the legacy; and your Honor held, that he had not reduced it into possession, so as to prevent his wife's right by survivorship. And why? Because he had received it as executor, and not in his marital right. The characters were totally distinct. That decision must govern our case.

Sir Samuel Romilly and Mr. Raithby for the defendants:—

To hold the will to be an execution of the power would be to overrule all the cases on residuary bequests. The case of Madison *v.* Andrew decides nothing more than that where a man has a general power of appointment, the fund shall be subject to his debts, which has long been the law of this Court. [Master of the Rolls.—But there, as in this case, the estate was settled subject to the power.] At any rate that case is not now an authority. As to the codicil, it is said, that the defect may be supplied; and so it may in common cases, but here it cannot be looked at, as it is not attested; because, here no intention appears to execute the power on the face of the instrument. A clear intention must appear, before the Court can aid the defect. The codicil is against the plaintiff. It shows that he forgot there was any power. He thought, in default of issue, the property would revert to him. And, if he forgot his power, the Court cannot hold that this will pass under a bequest of property. The plaintiff admits that the will of itself would not be an execution of the power, and the codicil amounts to nothing; for this is the case of a non-execution, and not of a defective execution. As to the point upon the settlement being voluntary, if it be correct, it cannot be acted upon in this case, because the plaintiff states the settlement, and grounds her title upon it. The question is not made by the bill, and

cannot now be gone into, even admitting that the law is as stated; whereas, here the fund is actually assigned, and the defendants do not require the assistance of the Court to defend their title.

Mr. Richards in reply:—

The limitation to the Earl of Cadogan was merely voluntary; it was a mark of respect to him; but, in point of law, he was a mere stranger. He could not have required a subpœna against our trustees. And, in fact, the defendants are asking relief, as they want to retain the fund, although they are bound to re-assign it in their character of mortgagors. [Master of the Rolls.—Lord Cadogan could not have come here, requiring Mr. Cadogan to give him a better security for the money. But here did Lord C. stand in need of any other aid? The assignment was as good an assignment as could be made of this reversionary interest. You may be a trustee for a volunteer.] Upon the will and codicil taken together, there can be no doubt but that this power was duly executed. The words in the codicil admit of no other meaning than that the property was given to his wife by his will.

Master of the Rolls having taken time to consider:—

Two points were made on the part of the plaintiff; 1st, that it was necessary that the husband should execute the power. But, 2dly, if it was, that his will did amount to an execution of it. As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this Court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself, and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the Court will execute it though voluntary.

Then the question is as to the power. The will, it was hardly contended, although attested, would amount to an execution of

the power. The circumstance of the attestation has been held not to be material, and it is now settled that a general disposition will not include property over which the party has only a power, unless an intention appear. But it is said, here is a codicil which will amount to an execution. For this no authority was cited; and I am not aware that the conception of the testator, of his power over his property, is ever referred to, except for the purpose of election. But here the question is upon an execution of a power. This point, however, is immaterial, as the codicil does not establish the testator's intention; he uses expressions descriptive only of the interests which his mother's settlement gave him in the fund, but that does not show that he meant to exercise the power. It is quite evident that he had not forgot his power. Here he remembered the settlement, and states that he had an absolute power over the 1,000 *l.* The request is not evidence that he might not consider that Lord C. would not, in some event, become entitled to the property. But here he meant only that the money should be deducted out of the 1,000 *l.* The codicil does not show that he considered all the property was his, which is necessary; and I should conclude the contrary. The bill must be dismissed as to this fund.

No. XXVII.

Bury v. *Bury* (*l*), *Ch.* 11*th July* 1748.

Sir Thomas Bury being seised of a freehold estate, and also possessed of a leasehold estate, on the marriage of his son, Thomas Bury, by lease and release, 3d and 4th January 1725, settled the freehold estate on himself for life; remainder to his wife for life; remainder to Thomas, his son, for life; remainder to his intended wife for life; remainder to his first and other sons in tail-male, with remainder to plaintiff for life, with remainder to his first and other sons in tail-male; with remainder over: and the leasehold premises were assigned to trustees, to raise money to renew the lease, then to pay the rents to Thomas, the son, for his life; remainder to his intended wife for her life; remainder to his first and other sons; remainder to the trustees, to pay the rents to plaintiff for his life; remainder to his first and other sons, with remainder over.

(*l*) *Vide supra*, vol. ii. p. 279, 293.

The marriage took effect; the wife died without leaving any issue male. Sir Thomas died.

Thomas Bury, on his second marriage with the defendant, having renewed the lease, by indenture, dated 31st Dec. 1736, settled the leasehold premises to himself for life, remainder to his second wife, the defendant, for life, with remainders over; and therein taking notice, that the said *Thomas Bury was seised for the term of his natural life with the power of jointuring* in the said freehold lands, did, for enlarging the jointure, grant the same to her, for life, with remainders over.

The marriage took effect. Thomas Bury died without leaving any issue male, either by his first or second wife; so that the plaintiff became entitled to the leasehold premises, by virtue of the settlement made on Thomas Bury's first marriage. The bill was brought against the second wife for an account of the rents and profits of the leasehold premises, and to have all deeds and writings relating thereto delivered up.

The defendant denied that she had any notice of the deeds 3d and 4th Jan. 1725, or that there was any settlement of the leasehold premises, or that any such deed was delivered to her with the rest of the writings. There was only one witness who had proved he had been employed to look over the title for Thomas Bury and defendant; and that amongst the papers he had seen a foul draft of the former settlement, and that there was no power of jointuring in the leasehold premises, which he told Thomas Bury of.

Lord Chancellor.—There are two questions: 1st, Whether she had notice? 2dly, if no notice, Whether she can protect herself under the lease renewed by her husband?

As to the 1st, there is no positive evidence of notice: she denied it by her answer, and there being only one witness against that answer, a decree cannot be made upon that one witness's testimony. Where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice: here the recital in the deed of the power of jointuring was sufficient to have made defendant have inquired into it, and therefore shall affect her. In Le Neve *v.* Le Neve she admitted Norton was her agent; and so that differs from this case.

As to the 2d, There was no surrender of the former lease, for the legal estate was in trustees, and therefore the Court is to

judge only as between *cestui que trusts*; and though the lease was renewed by T. Bury, yet it must follow the trust of the whole term, and he can have no contribution for what he paid, for he enjoyed it during his life. If a lease or deed is wrongfully given up or destroyed, you may give evidence of the purport of the deed, or have a discovery from the granters.—Decreed, that no alteration was made in the former trusts by Thomas's renewal of the lease.

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In order to avoid repetition, the points have been arranged under the heads to which they appeared principally to belong, and references have been made to the principal heads from every other title to which it was thought a reader would refer for any particular point. To give an instance, under the head, *Bankruptcy, Act of,* the reader is referred to "Notice," where he will find, whether or not an act of bankruptcy is notice to a purchaser.

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